false and malicious, and continued, "the publication of such charges by sending them to other parties to be read or by printing them in the newspapers, is by the laws of this state a criminal offence; and if the jury believe from the evidence in the case that Hanford was the author of that article, and he sent it to Van Osdel for the purpose of having it made public, then Hanford was guilty of an offence made criminal by the laws of this state. It was the clear legal light and it was the duty of Sullivan to protect his wife against those charges; it was his right and it was his duty to, if possible, suppress their publication, and to demand from their author an explanation or a retraction," &c.

The jury could hardly fail to understand this instruction, as applied to the facts, to mean, that the defendant had the legal right to protect his wife against those charges in the way he did, to wit, by shooting down the author of them.

The acquittal of the defendant upon such ruling is not surprising. But the defendant cannot be justified. Admitting all that his counsel claim for him in the evidence in the way of provocation and mitigating circumstances, still the irresistible conclusion is, that there was no necessity upon him, either real or apparent, for the killing of Hanford, and therefore at least he was guilty of manslaughter, and of that crime an intelligent public opinion can never hold him guiltless.

CHAS. H. WOOD.

RECENT AMERICAN DECISIONS.

Supreme Court of the United States.

THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY v. FRANCISCA SCHAEFER.

A policy of insurance taken out by husband and wife, on their joint lives for the benefit of the survivor, is not impaired by a subsequent divorce, even where there are no issue of the marriage.

An insurance on life is not a contract of indemnity, and it is valid, if there is in good faith an insurable interest at the time of the making of the policy, though it afterwards changes in amount or ceases altogether.

Any reasonable expectation of pecuniary benefit or advantage from the continued life of another, creates an insurable interest in such life.

An attorney is not a competent witness in a United States court to testify to facts communicated to him by a client in his professional capacity, although he would be competent by the law of the state in which such court may be sitting.

The rules of evidence in the federal courts, not affecting rights of property are under the control of Congress, and the Acts of Congress have made communications between counsel and client privileged.

IN error to the Circuit Court of the United States for the Southern District of Ohio.

This was an action on a policy of life assurance issued July 25th 1868, on the joint lives of George F. and Francisca Schaefer (then husband and wife), payable to the survivor on the death of either. In January 1870, they were divorced and alimony was decreed and paid to the wife; and there was never any issue of the marriage. They both subsequently married again, after which, in February 1871, George F. Schaefer died. This action was brought by Francisca, the survivor.

On the trial of the cause several exceptions were taken by the defendant (the insurance company) to the rulings and charge of the court, and this writ of error was brought to reverse the judgment for alleged error in said rulings and charge.

George Hoadley and *Edgar M. Johnson*, for plaintiff in error.

George D. Brannan, for defendant in error.

The opinion of the court was delivered by

BRADLEY, J.—The first exception was for overruling certain testimony offered by the defendant. The plaintiff having offered herself as a witness, on her cross-examination admitted that she had employed one Harris as her attorney to file her petition for divorce; and being questioned whether she had not stated to him, to be embodied in the petition, that Schaefer had been an habitual drunkard for a period of more than three years prior to the date of filing the petition, denied that she had so stated to him. (Had such been the fact it would have falsified the statement made in the application for insurance.) The defendant called Harris, and asked him whether the plaintiff had not so stated to him on that occasion. The question was objected to and overruled as calling for confidential communications between attorney and client. The defendant alleges that herein the court erred, because, by the law of Ohio such communications are not privileged. An examination of the Ohio statutes renders it doubtful whether the law is as the defendant contends. But if it were, the court did right to exclude the testimony. The laws of the state are only to be regarded as rules of decision in the courts of the United States where the constitution, treaties or statutes of the United States have not otherwise provided. When the latter speak they are controlling; that is to

say, on all subjects on which it is competent for them to speak. There can be no doubt that it is competent for Congress to declare the rules of evidence which shall prevail in the courts of the United States, not affecting rights of property; and where Congress has declared the rule, the state law is silent. Now, the competency of parties as witnesses in the federal courts depends on the Act of Congress in that behalf, passed in 1864, amended in 1865, and codified in the Revised Statutes, sect. 858. It is not derived from the statute of Ohio, and is not subject to the conditions and qualifications imposed thereby. The only conditions and qualifications which Congress deemed necessary are expressed in the Act of Congress; and the admission in evidence of previous communications to counsel is not one of them. And it is to be hoped that it will not soon be made such. The protection of confidential communications made to professional advisers is dictated by a wise and liberal policy. If a person cannot consult his legal adviser without being liable to have the interview made public the next day by an examination enforced by the courts, the law would be little short of despotic. It would be a prohibition upon professional advice and assistance.

The other exceptions were to the charge of the court, and relate to two points; first, to the forbearance note given for a portion of the last renewal premium, and, secondly, to the alleged failure of interest of the plaintiff in the policy caused by the divorce of the insured parties.

First: as to the forbearance note. Only one-half of the annual premium was required to be paid in cash; the insured, if they chose, could have a credit for the other half. This credit was given upon the assured's signing an acknowledgment in the following form: "I hereby acknowledge a credit or forbearance of —— dollars of the premium on my policy No. —, which amount shall be a lien on said policy at 6 per cent. per annum until paid or adjusted by return of surplus premium." It was not a note promising to pay money; but a form of acknowledgment by which the assured consented to a deduction from the policy for non-payment of a portion of the premium. As long as George F. Schaefer took any interest in the policy he signed this acknowledgment for himself and wife, "George F. and Franz. Schaefer;" or for himself alone. One premium became due after the divorce, and Francisca Schaefer herself attended to the payment of it,—paying the cash portion,

and authorizing her son to sign the forbearance note, as it is called. He did so in the name of both parties insured, thus: "George F. & C.[1] Schaefer." The company accepted it. On what valid ground they can now object to the transaction, it is difficult to see. A joint act was to be done. Only one of the parties could physically do it. Either had a right to do it. This act was, to pay or settle the annual premium. The plaintiff, as one of the joint parties, performed what was necessary to be done. George F. Schaefer could not complain; for it was done in his interest, keeping the policy alive for his benefit as well as Francisca's. The company could not complain, for they accepted both the money and the acknowledgment in the form in which they were given. There is no pretence that any deception was practised upon them.

This point is really frivolous.

The other point, relating to the alleged cessation of insurable interest by reason of the divorce of the parties, is entitled to more serious consideration, although we have very little difficulty in disposing of it.

It will be proper, in the first place, to ascertain what is an insurable interest. It is generally agreed that mere wager policies, that is, policies in which the insured party has no interest whatever in the matter insured, but only an interest in its loss or destruction, are void as against public policy. This was the law of England prior to the Revolution of 1688; but after that period a course of decisions grew up sustaining wager policies. The legislature finally interposed and prohibited such insurance; first with regard to marine risks, by statute of 19 Geo. II., c. 37; and next with regard to lives, by the statute of 14 Geo. III., c. 48. In this country, statutes to the same effect have been passed in some of the states, but where they have not been, in most cases either the English statutes have been considered as operative, or the older common law has been followed. But precisely what interest is necessary in order to take a policy out of the category of mere wager, has been the subject of much discussion. In marine and fire insurance the difficulty is not so great, because there insurance is considered as strictly an indemnity. But in life insurance the loss can seldom be measured by pecuniary values. Still an interest of some sort in the insured life must exist. A man cannot take out insurance on

[1] "C." is evidently a mistake in the record for "F."

the life of a total stranger, nor on that of one who is not so connected with him as to make the continuance of the life a matter of some real interest to him.

It is well settled that a man has an insurable interest in his own life, and in that of his wife and children; a woman in the life of her husband; and the creditor in the life of his debtor. Indeed, it may be said generally that any reasonable expectation of pecuniary benefit or advantage from the continued life of another creates an insurable interest in such life. And there is no doubt that a man may effect an insurance on his own life for the benefit of a relative or friend; or two or more persons, on their joint lives, for the benefit of the survivor or survivors. The old tontines were based substantially on this principle, and their validity has never been called in question.

The essential thing is, that the policy shall be obtained in good faith, and not for the purpose of speculating upon the hazard of a life in which the insured has no interest. On this point, the remarks of Chief Justice SHAW, in a case which arose in Connecticut (in which state the present policy originated), seem to us characterized by great good sense. He says: "In discussing the question in this Commonwealth (Massachusetts) we are to consider it solely as a question of common law, unaffected by the statute of 14 Geo. III., passed about the time of the commencement of the Revolution, and never adopted in this state. All, therefore, which it seems necessary to show, in order to take the case out of the objection of being a wager policy, is that the insured has some interest in the *cestui que vie;* that his temporal affairs, his just hopes and well-grounded expectations of support, of patronage and advantage in life will be impaired; so that the real purpose is not a wager, but to secure such advantages, supposed to depend on the life of another; such, we suppose, would be sufficient to prevent it from being regarded as a mere wager. Whatever may be the nature of such interest, and whatever the amount insured, it can work no injury to the insurers, because the premium is proportioned to the amount; and whether the insurance be a large or small amount, the premium is computed to be a precise equivalent for the risk taken. We cannot doubt," he continues, "that a parent has an interest in the life of a child, and, *vice versa*, a child in the life of a parent; not merely on the ground of a provision of law that parents and grandparents

are bound to support their lineal kindred when they stand in need of relief, but upon considerations of strong morals, and the force of natural affection between near kindred, operating often more efficaciously than those of positive law :" *Loomis* v. *Eagle Life Insurance Co.*, 6 Gray 399. We concur in these views, and deem it unnecessary to cite further authorities, all those of importance being collected and arranged in the recent treatises on the subject: See May on Insurance, sects. 102–111; Bliss on Life Insurance, sects. 20–31."

The policy in question might, in our opinion, be sustained as a joint insurance, without reference to any other interest, or to the question whether the cessation of interest avoids a policy good at its inception. We do not hesitate to say, however, that a policy taken out in good faith and valid at its inception, is not avoided by the cessation of the insurable interest, unless such be the necessary effect of the provisions of the policy itself. Of course, a colorable or merely temporary interest would present circumstances from which want of good faith and an intent to evade the rule might be inferred. And in cases where the insurance is effected merely by way of indemnity, as where a creditor insures the life of his debtor, for the purpose of securing his debt, the amount of insurable interest is the amount of the debt.

But supposing a fair and proper insurable interest, of whatever kind, to exist at the time of taking out the policy, and that it be taken out in good faith, the object and purpose of the rule which condemns wager policies is sufficiently attained; and there is then no good reason why the contract should not be carried out according to its terms. This is more manifest where the consideration is liquidated by a single premium paid in advance, than where it is distributed in annual payments during the insured life. But, in any case, it would be very difficult, after the policy had continued for any considerable time, for the courts, without the aid of legislation, to attempt an adjustment of equities arising from a cessation of interest in the insured life. A right to receive the equitable value of the policy would probably come as near to a proper adjustment as any that could be devised. But if the parties themselves do not provide for the contingency, the courts cannot do it for them.

In England by the operation of the statute of 14 Geo. III., as construed by the courts, the law has assumed a very definite form. In a lucid judgment delivered by Baron PARKE in the Exchequer

Chamber in the case of *Dalby* v. *Life Ins. Co.*, decided in 1854, 15 C. B. 365, it was held that the true meaning of the statute is, that there must be an interest at the time the insurance is effected, but that it need not continue until death; the words of the statute being, "that no insurance shall be made on a life or lives wherein the assured shall have no interest, or by way of gaming or wagering," and "that in all cases where the insured *hath* interest in such life, &c., no greater sum shall be recovered than the amount or value of the interest." The word "hath" was construed as necessarily referring to the time of effecting the insurance, and not to the time of the death; that being the only construction which would subserve the object of the statute to discourage wagering, render the contract uniform and certain, and preserve a fixed relation between the premiums and the amount insured, as required by the principles of life assurance. This case overruled the previous case of *Goodsall* v. *Boldero*, 9 East 72, decided by Lord ELLENBOROUGH, in which, proceeding upon the idea that life insurance is a mere contract of indemnity, it was held that the interest must continue until death, and even until the bringing of the action. Baron PARKE, in commenting upon this case, very justly says: "Upon considering this case, it is certain that Lord ELLENBOROUGH decided it upon the assumption that a life policy was in its nature a mere contract of indemnity, as policies on marine risks, and against fire, undoubtedly are; and that the action was, in point of law, founded on the supposed damnification, occasioned by the death of the debtor, existing at the time of the action brought; and his lordship relied upon the decision of Lord MANSFIELD in *Hamilton* v. *Mendes*, 2 Burr. 1270, that the plaintiff's demand was for an indemnity only. Lord MANSFIELD was speaking of a policy against marine risks, which is in its terms a contract for indemnity only. But that is not the nature of what is termed an assurance for life: it really is what it is on the face of it—a contract to pay a certain sum in the event of death. It is valid at common law; and, if it is made by a person having an interest in the duration of the life it is not prohibited by the statute."

As thus interpreted we might almost regard the English statute as declaratory of the original common law, and as indicating the proper rule to be observed in this country, where that law furnishes the only rule of decision.

Be this, however, as it may, in our judgment a life policy, origi-

nally valid, does not cease to be so by the cessation of the assured party's interest in the life assured.

The judgment of the Circuit Court is affirmed.

I. The decision of the court upon the first point raised in this case is apparently in conflict with the last clause of section 858 of the Revised Statutes of the United States. That section provides that "In the courts of the United States no witness shall be excluded in any action on account of color, or in any civil action because he is a party to or interested in the issue tried: Provided, that in actions by or against executors, administrators or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other as to any transaction with or statement by the testator, intestate or ward, unless called to testify thereto by the opposite party or required to testify thereto by the court. In all other respects, the laws of the state in which the court is held shall be the rules of decision as to the competency of witnesses in the courts of the United States, in trials at common law and in equity and admiralty."

The Code of Civil Procedure of Ohio provided (sect. 314) that certain classes of persons should be incompetent to testify, and, among others, "an attorney concerning any communication made to him in that relation, or his advice thereon, without the client's consent."

Sect. 315 provided that "if a person offer himself as a witness, that is to be deemed a consent to the examination also of an attorney * * * on the same subject."

The doubt expressed by the court as to the present state of the law in Ohio arose from the fact that an amendment to sect. 314, passed in 1870, inserted the word "express" in the 314th sect. before the words "client's consent," and also because the amendment made various other changes in the original sect. 314, which tended to show an intention of the legislature to repeal sect. 315 of the Code.

At first sight it would seem that the last clause of sect. 858 of the Revised Statutes of the United States would oblige the federal courts to follow the state law as to the competency of an attorney to testify as to communications made by the client, in case the client had himself given evidence. But the decision of the Supreme Court is maintainable on two grounds; first, because the question is not really one as to the *competency* of a witness, but as to the admissibility of a certain kind of testimony. The attorney is a competent witness, but the common law of the United States forbids him to divulge in court communications made to him in his capacity of attorney. The last clause of sect. 858 does not require the United States courts to follow the laws of the states relating to the rules of evidence, but is limited to the state laws regarding the competency of witnesses. It being the law of the federal courts that confidential communications to attorneys shall be protected, no state can by statute impose a different rule on the courts of the United States. Second, the provisions of the 315th sect. of the Ohio Code are in derogation of the first clause of sect. 858 of the Revised Statutes of the United States, which declares that in civil actions no witness shall be excluded because he is a party to or interested in the issue tried. The effect of permitting an attorney to disclose communications in case the client has testified is to impose a penalty upon the witness for testifying. Congress has given to parties to an

action the unqualified right to testify, and no state can place a restriction upon the free exercise of that privilege by declaring that parties who avail themselves of the right shall be liable to suffer a penalty for so doing. The law of Ohio, as declared in sect. 315 of the Code, says to every party to an action, "You *may* testify, but if you do you shall pay a forfeit." The state can prescribe such a rule for its own courts, but the federal courts cannot adopt this rule, because they would thereby render the Act of Congress partially nugatory.

II. The last point decided by the Supreme Court is one of great interest, as it concerns a question which has never before been directly decided in this country, although as early as 1855 both the Exchequer Chamber and the Court of Chancery in England had established the principle here involved.

In *Dalby* v. *India and London Life Ass. Co.*, 15 C. B. 365, and in *Law* v. *London Indisputable Life Policy Co.*, 1 Kay & Johns. 223, it was held that where a creditor had insured the life of his debtor, the policy continued in force and the creditor might recover on it, although the debt had been paid before the death of the debtor. But Mr. May, in his work on Insurance, although expressing himself in favor of the doctrine that the cessation of interest in the life insured ought not to avoid a policy which was valid when made, nevertheless contends that the English cases are not authority in this country, because those cases were decided under the peculiar phraseology of the Act of 14 Geo. III., c. 48. Mr. May, however, has been led into a mistaken construction of the meaning of the decisions in England by his desire to uphold, at all hazards, his favorite theory as to the nature of the contract of life insurance. He contends that life insurance is always a contract of indemnity, and maintains that in this country the cases support his view. But in *Dalby* v. *India and London Life Ass. Co.*, Baron PARKE emphatically declares that life insurance is not a contract of indemnity, and in order to save his pet theory from the effect of this blow, Mr. May argues that the decision of Baron PARKE rests on the ground that life insurance was not a contract of indemnity by the common law of England, and that the Act of 14 Geo. III., c. 48, only required an interest in the life insured at the inception of the contract, but that, as by the law of this country the contract is one of indemnity, and as we have no such statute as the 14 Geo. III., c. 48, therefore the English cases are not to be regarded as authority in the courts of the United States. But this argument begs the very question in issue, viz., whether life insurance is a contract of indemnity. In the principal case the Supreme Court of the United States adopt the words of Baron PARKE and say that they express the law of this country.

The truth is that Mr. May confounds the question as to the nature of the contract with the rule against wagers. A life insurance policy is not at all a contract of indemnity, but there exists in England a statute against policies unsupported by interest in the life insured, and in this country there is a rule of public policy against such contracts. In both countries, however, this prohibition rests on the ground that policies without interest are mere wagers.

The rule against wager policies, whether it exist by statute or as part of the common law, is purely a rule of public policy, and is not in any sense founded on the idea that contracts of life insurance are contracts of indemnity.

No other view of the subject will

explain the decisions in the two English cases and in the principal case, and also the *dicta* of various American courts hereafter referred to. If the contract be one of indemnity, there can be no escape from the conclusion that cessation of interest in the life insured would prevent recovery on the policy, because in such a case the holder of the policy would not be damnified by the death. The same rule would have to be applied as in cases of fire and marine insurance. But if the contract of life insurance is not one of indemnity, the cases are easily supported. The rule of public policy is satisfied if there exist at the inception of the contract an interest in the life insured, for the contract is then not a wager. Public policy being thus satisfied, the contract is, like every other contract, to be construed and enforced according to its provisions and stipulations, and there being no stipulation against liability in case of cessation of interest in the life insured, such an event will not avoid the contract. In other words, the law stands between parties who are endeavoring to enter into an illegal contract, but if the parties are so situated with reference to the subject-matter, that the proposed contract is not illegal, upon the consummation of the contract, they become bound by the legal tie and can only be separated in accordance with their agreement.

The book of Mr. May has not the authority of a legal classic, either in the long standing of the book itself, or the personal weight of its author's opinion, but as a recent collection and review of the cases upon an important branch of law now in process of rapid development, its conclusions will be likely to receive a large amount of consideration from counsel and even from courts whom the pressure of business prevents giving the subject the attention its importance requires. For this reason it is desirable that the conclusions and rules laid down in the book should be carefully weighed and criticised when they appear as in this case to be the result of a hasty or incomplete view of the subject, or of an effort even unconsciously to force the law to conform to a preconceived crotchet as to what it ought to be.

But although this question has not before been directly decided in any American case, there have been a number of cases where the courts have uttered *dicta* in support of the doctrine just laid down by the Supreme Court.

In *Trenton Ins. Co.* v. *Johnson*, 4 Zab. 576, it was said that in New Jersey no interest at all was necessary to support a policy of life insurance. This case goes too far, and can be supported only on the ground that in that state wager policies are not illegal.

In *Mowry* v. *Ins. Co.*, 9 R. I. 346, and in *Raw's* v. *Ins. Co.*, 3 Am. Law Reg. N. S. 167; s. c., 27 N. Y. 282, the court found that there was in fact an interest existing at the time of the death, but in both cases the court said that the interest need not continue until the death. In the latter case *Dalby* v. *Ins. Co.* was approved, and in referring to that case the court said: "It seems remarkable that any other view should be taken of this question. The contract is not to make any loss good, or to make compensation. The debt is not insured. It is an absolute contract to pay, not the amount of a loss or damage arising from a death, but a specified sum of money upon the termination of the life insured."

The Supreme Court of the United States in *Insurance Co.* v. *Bailey*, 13 Wall. 616, laid down the same doctrine although the point was not necessary to the decision in that case.

The case of *McKee* v. *Ins. Co.*, 28 Mo. 383, is the only other case where a divorce was relied upon as defeating a

policy on the life of a husband for the benefit of the wife, but that case presented different features, because there had been issue of the marriage, and the minor children remained with the mother. The court found, therefore, that an insurable interest in the life of the former husband still existed, because there was a reasonable expectation that the father would assist in the support and education of the children.

There are two other cases in which the doctrine of the principal case must have been taken for granted. They are *St. John* v. *Ins. Co.*, 13 N. Y. 31, and *Valton* v. *Assurance Society*, 20 N. Y. 32, in both of which cases, it was held that the assignee of a policy, valid when issued, may recover without proof of interest in the life insured and without regard to the amount of consideration paid for the assignment. See also *McKenty* v. *Ins. Co.*, 4 Bigelow's Cases 153; *Campbell* v. *Ins. Co.*, 98 Mass. 381; *Provident Life Ins. Co.* v. *Baum*, 29 Ind. 236.

The most difficult question which arises on the consideration of this subject is one which was not solved by the court in this case. It is the question as to what sort of interest is necessary to sustain a life policy. The court said: "It may be said generally that any reasonable expectation of pecuniary benefit or advantage from the continued life of another creates an insurable interest in such life." This passage would seem to impose the limitation that the interest must be *pecuniary*, but the court could hardly have intended to do this, for in the next paragraph of the decision the court quote with approval the words of Chief Justice SHAW in *Loomis* v. *Eagle Life Ins. Co.*, 6 Gray 399, who spoke of "considerations of strong morals and the force of natural affection between near kindred," as affording a sufficient interest.

In *Insurance Co.* v. *Bailey*, 13 Wall. 616, the Supreme Court of the United States also spoke of the relations of "consanguinity or of affinity," and of "dependence" and "natural affection," as constituting an insurable interest.

The nature and *quantum* of interest necessary to support a policy of life insurance are things which can hardly be said to be very definitely fixed. It has been held that a sister has an interest in the life of a brother who supported her (*Lord* v. *Dall*, 12 Mass. 115); and even where he did not support her, but was unmarried, and she was one of the next of kin (*Ætna Ins. Co.* v. *France*, S. C. U. S., Oct. T. 1876, not reported); a father in the life of a minor son (*Mitchell* v. *Union Life Ins. Co.*, 45 Me. 104; *Loomis* v. *Eagle Ins. Co.*, 6 Gray 396); a woman in the life of a man with whom she had lived, believing herself to be his wife, although she was in fact married to another man, whom she supposed to be dead (*Equitable Life Ass. Soc.* v. *Patterson*, 41 Ga. 338). In all these cases there was an expectation of pecuniary advantage from the continuance in life of the insured, but in several of the cases, as well as in others already cited, the courts use language tending to show that if necessary, they would regard the mere relationship as sufficient to support the policy.

The catalogue of insurable interests has undoubtedly been gradually increasing, but still it cannot be said that there has been established any definite general principle, which might serve as a guide in determining any given case which may arise.

Perhaps the most definite rule which could be adopted would be to hold that a life policy is not a wager whenever the person effecting the insurance and the insured stand in such relation to each other, that the former might reasonably and naturally be expected to desire the continuance in life of the

latter, and to make it a question for the jury in each case, whether the contract is a mere betting upon the chances of life.

The language used by Judge HOAR in *Forbes* v. *Insurance Co.*, 15 Gray 249, 254, points to this solution of the difficulty. He said: "As the premium is intended to be a precise equivalent to the risk taken, it would seem that the contract is a just and equitable one, whether any interest in the life exists or not; *and that the only essential inquiry is whether the object of the contract is such as to obviate the objections to a mere wager upon the chances of life.*"

As, however, it is the habit of most courts, not to lay down general principles, but to decide merely that such an interest as exists in the particular case before them, is or is not an insurable interest, any such general rule as has been stated above, will only be arrived at after nearly every conceivable sort of interest has been ranged in one class or the other, by the process of judicial elimination.

J. D. B.

Supreme Court of the United States.

DANIEL R. BRANT, APPELLANT, *v.* THE VIRGINIA COAL AND IRON COMPANY AND JANE SINCLAIR.

Where a testator made a bequest to his wife of all his estate, real and personal "to have and to hold during her life, and to do with as she sees proper before her death," it was held that the wife took a life estate in the property, with only such power as a life-tenant can have, and that her conveyance of the real property passed no greater interest.

For the application of the doctrine of equitable estoppel, there must generally be some intended deception in the conduct or declarations of the party to be estopped, or such gross negligence on his part as to amount to constructive fraud, by which another has been misled to his injury.

Where the estoppel relates to the title of real property, it is essential to the application of the doctrine that the party claiming to have been influenced by the conduct or declarations of another was himself not only destitute of knowledge of the true state of the title, but also of any convenient and available means of acquiring such knowledge. Where the condition of the title is known to both parties, or both have the same means of ascertaining the truth, there is no estoppel.

APPEAL from the Circuit Court of the United States for the District of West Virginia.

In April 1831, Robert Sinclair, of Hampshire county, Virginia, died leaving a widow and eight surviving children. He was at the time of his death, possessed of some personal property, and the real property in controversy, consisting of one hundred and ten acres. By his last will and testament he made the following devise: "I give and bequeath to my beloved wife, Nancy Sinclair, all my estate, both real and personal, that is to say, all my lands, cattle, horses, sheep, farming utensils, household and kitchen furniture,

with everything that I possess, to have and to hold during her life, and to do with as she sees proper before her death." The will was duly probated in the proper county.

In July 1839, the widow, for the consideration of eleven hundred dollars, executed a deed to the Union Potomac Company, a corporation created under the laws of Virginia, of the real property thus devised to her, describing it as the tract or parcel of land on which she then resided, and the same which was conveyed to her "by the last will and testament of her late husband." As security for the payment of the consideration she took at the time from the company its bond and a mortgage upon the property. The mortgage described the property as the tract of land which had on that day been conveyed by her to the Union Potomac Company.

In 1854 this bond and mortgage were assigned to the complainant, Daniel Brant and Hector Sinclair, the latter a son of the widow, in consideration of one hundred dollars cash, and the yearly payment of the like sum during her life. Previous to this time, Brant and Hector Sinclair had purchased the interest of all the other heirs except Jane Sinclair, who was at the time an idiot, or an insane person; and such purchase was recited in the assignment, as was also the previous conveyance of a life-interest to the company.

In July 1857, these parties instituted suit for the foreclosure of the mortgage and sale of the property. The bill described the property as a tract of valuable coal land, which the company had purchased of the widow, and prayed for the sale of the estate purchased. Copies of the deed of the widow and of the mortgage of the company were annexed to the bill. In due course of proceedings a decree was obtained directing a sale, by commissioners appointed for that purpose, of the property, describing it as "the land in the bill and proceedings mentioned," if certain payments were not made within a designated period. The payments not being made, the commissioners, in December 1858, sold the mortgaged property to one Patrick Hammill, who thus succeeded to all the rights of the Union Potomac Company.

The defendant corporation, the Virginia Coal and Iron Company, derived its title and interest in the premises, by sundry mesne conveyances from Hammill, and in 1867 went into possession. Since then it has cut down a large amount of valuable timber, and has engaged in mining and extracting coal from the land and disposing of it.

Brant, having acquired the interest of Hector Sinclair, brought the present suit to restrain the company from mining and extracting coal from the land, and to compel an accounting for the timber cut, and the coal taken and converted to its use.

The opinion of the court was delivered by

FIELD, J., (after stating the facts).—The disposition of the case depends upon the construction given to the devise of Robert Sinclair to his widow, and the operation of the foreclosure proceedings, as an estoppel upon the complainant from asserting title to the property.

The complainant contends that the widow took a life-estate in the property, with only such power as a life-tenant can have, and that her conveyance therefor carried no greater interest to the Union Potomac Company. The defendant corporation, on the other hand, insists that with the life-estate, the widow took full power to dispose of the property absolutely, and that her conveyance accordingly passed the fee.

We are of opinion that the position taken by the complainant is the correct one. The interest conveyed by the devise to the widow was only a life estate. The language used admits of no other conclusion. And the accompanying words "to do with as she sees proper before her death," only conferred power to deal with the property in such manner as she might choose, consistently with that estate, and perhaps without liability for waste committed. These words, used in connection with a conveyance of a leasehold estate, would never be understood as conferring a power to sell the property so as to pass a greater estate. Whatever power of disposal the words confer, is limited by the estate with which they are connected.

In the case of *Bradley* v. *Westcott*, 13 Vesey *449, the testator gave all his personal estate to his wife, for her sole use for life, to be at her full, free and absolute disposal and disposition during life; and the court held, that as the testator had given in express terms an interest for life, the ambiguous words afterward thrown in could not extend that interest to the absolute property. "I must construe," said the Master of the Rolls, "the subsequent words with reference to the express interest for life previously given, that she is to have as full, free and absolute disposition as a tenant for life can have."

In *Smith* v. *Bell*, 6 Peters 68, the testator gave all his personal estate, after certain payments, to his wife, "to and for her

own use and disposal absolutely," with a provision that the remainder after her decease should go to his son. The court held that the latter clause qualified the former, and showed that the wife only took a life-estate. In construing the language of the devise, Chief Justice MARSHALL, after observing that the operation of the words "to and for her own use and benefit and disposal absolutely," annexed to the bequest, standing alone, could not be questioned, said: "But suppose the testator had added the words 'during her natural life;' these words would have restrained those which preceded them, and have limited the use and benefit and the absolute disposal given by the prior words, to the use and benefit and to a disposal for the life of the wife. The words, then, are susceptible of such limitation. It may be imposed on them by other words. Even the words 'disposal absolutely' may have their character qualified, by restraining words connected with and explaining them, to mean such absolute disposal as a tenant for life may make."

The Chief Justice then proceeded to show that other equivalent words might be used, equally manifesting the intent of the testator to restrain the estate of the wife to her life, and that the words devising a remainder to the son were thus equivalent.

In *Boyd* v. *Strahan*, 36 Ill. 355, there was a bequest to the wife of all the personal property of the testator, not otherwise disposed of, "to be at her own disposal and for her own proper use and benefit during her natural life," and the court held that the words "during her natural life" so qualified the power of disposal as to make it mean such disposal as a tenant for life could make.

Numerous other cases to the same purport might be cited. They all show that where a power of disposal accompanies a bequest or devise of a life-estate, the power is limited to such disposition as a tenant for life can make, unless there are other words clearly indicating that a large power was intended.

The position that the complainant is estopped by the proceedings for the foreclosure of the mortgage, from asserting title to the property, has less plausibility than the one already considered. There was nothing in the fact that the complainant and Hector Sinclair owned seven-eighths of the reversion which prevented them from taking a mortgage upon the life-estate, or purchasing one already executed. There was no misrepresentation of the character of the title which they sought to subject to sale by the foreclosure suit. The bill of complaint in the suit referred to the deed from the widow

to the Union Potomac Company, and to mortgage executed to secure the consideration, and copies were annexed. As already stated, the deed described the property sold as the tract conveyed to the widow by the last will and testament of her late husband. The mortgage described the property as the tract of land conveyed on the same day to the mortgagor. The decree ordering the sale described the property as "the lands in the bill and proceedings mentioned." The purchaser was bound to take notice of the title. He was directed to its source by the pleadings in the case. The doctrine of caveat emptor applies to all judicial sales of this character; the purchaser takes only the title which the mortgagor possessed; and here, as a matter of fact, he knew that he was obtaining only a life-estate by his purchase. He so stated at the sale, and frequently afterward. There is no evidence that either the complainant or Hector Sinclair ever made any representations to the defendant corporation to induce it to buy the property from the purchaser at the sale, or that they made any representations to any one respecting the title inconsistent with the fact; but, on the contrary, it is abundantly estalished by the evidence in the record, that from the time they took from the widow the assignment of the bond and mortgage of the Union Potomac Company, in 1854, they always claimed to own seven-eighths of the reversion. The assignment itself recited that the widow had owned and had sold to that company a life-interest in the property, and that they had acquired the interest of the heirs.

It is difficult to see where the doctrine of equitable estoppel comes in here. For the application of that doctrine there must generally be some intended deception in the conduct or declarations of the party to be estopped, or such gross negligence on his part as to amount to constructive fraud, by which another has been misled to his injury. "In all this class of cases," says Story, "the doctrine proceeds upon the ground of constructive fraud or of gross negligence, which in effect implies fraud. And, therefore, when the circumstances of the case repel any such inference, although there may be some degree of negligence, yet courts of equity will not grant relief. It has been accordingly laid down by a very learned judge that the cases on this subject go to this result only, that there must be positive fraud or concealment, or negligence so gross as to amount to constructive fraud:" 1 Story's Equity 391. To the same purport is the language of the adjudged cases. Thus it is said by the Su-

preme Court of Pennsylvania that "the primary ground of the doctrine is that it would be a fraud in a party to assert what his previous conduct had denied, when on the faith of that denial others have acted. The element of fraud is essential either in the intention of the party estopped or in the effect of the evidence which he attempts to set up:" *Hill* v. *Epley*, 31 Penna. St. 334; *Henshaw* v. *Bissell*, 18 Wall. 271; *Boggs* v. *Merced Mining Company*, 14 Cal. 368; *Davis* v. *Davis*, 26 Id. 23; *Commonwealth* v. *Moltz*, 10 Barr 531; *Copeland* v. *Copeland*, 28 Maine 539; *Delaplaine* v. *Hitchcock*, 6 Hill 616; *Havis* v. *Marchant*, 1 Curtis C. C. 136; *Zuchtmann* v. *Robert*, 109 Mass. 53. And it would seem that to the enforcement of an estoppel of this character with respect to the title of property, such as will prevent a party from asserting his legal rights, and the effect of which will be to transfer the enjoyment of the property to another, the intention to deceive and mislead, or negligence so gross as to be culpable, should be clearly established.

There are undoubtedly cases where a party may be concluded from asserting his original rights to property in consequence of his acts or conduct, in which the presence of fraud, actual or constructive, is wanting; as where one of two innocent parties must suffer from the negligence of another; he through whose agency the negligence was occasioned will be held to bear the loss; and where one has received the fruits of a transaction, he is not permitted to deny its validity whilst retaining its benefits. But such cases are generally referable to other principles than that of equitable estoppel, although the same result is produced; thus the first case here mentioned is the affixing of liability upon the party who from negligence indirectly occasioned the injury, and the second is the application of the doctrine of ratification or election. Be this as it may, the general ground of the application of the principle of equitable estoppel is as we have stated.

It is also essential for its application with respect to the title of real property that the party claiming to have been influenced by the conduct or declarations of another to his injury, was himself not only destitute of knowledge of the true state of the title, but also of any convenient and available means of acquiring such knowledge. Where the condition of the title is known to both parties, or both have the same means of ascertaining the truth, there can be no estoppel: *Crest* v. *Jack*, 3 Watts 240; *Knouff* v. *Thompson*, 4 Harris 361.

Tested by these views, the defence of estoppel set up in this case entirely fails.

The decree of the Circuit Court must be reversed, and the cause remanded for further proceedings in accordance with this opinion.

The foregoing case rests upon two questions. As to the first, that, namely, as to the effect of the words in the will in determining the estate held, we shall say nothing, remembering the ever-varying character of the authorities upon such points and the fact that every case of the interpretation of a will rests peculiarly upon its own foundation; in no species of case can we cite authorities with so little confidence, beyond those bearing upon a few general principles. In the language of the court in 3 Wilson 141, "Cases on wills may guide us to general rules of construction, but unless a case cited be in every respect directly in point and agree in every circumstance, it will have little or no weight with the court, which always looks upon the intention of the testator as the polar star to direct them in the construction of wills."

Upon the matter involved in the second head of the opinion—equitable estoppel—it may, however, be of some service to present some of the cases bearing upon some of the points.

The doctrine of equitable estoppel, as it is called, though we prefer the name estoppel by conduct, as more expressive of the true nature of the thing, is of comparatively recent growth; for a long time the old maxim, "estoppels are odious," resisted all assaults upon its authority and was only undermined by slow degrees. It is not our intention to narrate its history or to examine the doctrine fully, but merely to look at a few of its salient points, as exhibited by decided cases.

I. *As to what action induced by conduct will suffice to estop.*

It may, in the first place, be assumed, as announced by the unanimous voice of the authorities, that in order to estop, the declaration or conduct relied upon as estoppel must have produced action on the part of the person who seeks to take advantage of the estoppel. COULTER, J., well expressed the law on the subject in *Patterson* v. *Lytle*, 1 Jones (Pa.) 53 (1849); "The principle, I apprehend, runs through the whole doctrine of estoppel that a man is only prevented from alleging the truth when his assertion of a falsehood or his silence has been the inducement to *action* by the other party, which would result in loss if the opponent was permitted to gainsay what he had before asserted or induced the other to believe by his acts." In *Meister* v. *Birney*, 24 Mich. 435 (1872), COOLEY, J., said: "But there can be no estoppel unless the plaintiff was induced to take some action in reliance upon the statement, which he was not legally bound to take, which otherwise he would not have taken and which will result to his detriment if the statement upon which he relied is allowed to be disproved." See also *Otis* v. *Sell*, 8 Barb. 102 (1849); *Eldred* v. *Hazlitt's Adm'r*, 9 Casey 307 (1858).

As to the amount of action which the party seeking to enforce the estoppel must have taken, in *Meister* v. *Birney*, *supra*, the fact that the party had made expenditures in litigation was considered a sufficient support for an estoppel. In *Brookman* v. *Metcalf*, 4 Rob. 568 (1867), the plaintiff brought an action on a promissory note, and the Statute of Limitations was pleaded. The evidence showed that the plaintiff had previously brought an action against the

same defendant on another note, given under similar circumstances with the one then in suit, that he had, before the bar of the statute intervened, met the defendant and told him that he intended to sue out the second note; whereupon the defendant said that if the plaintiff would forbear suing he would let the second note abide the result of the action on the first. The plaintiff thereupon countermanded an order which he had given to his attorney to bring action, but the defendant afterwards refused to abide the result of the first case. The court held the defendant estopped from setting up the statute. This case, however, was overruled by *Shapley* v. *Abbott*, 42 N. Y. 443 (1870), which also arose with reference to the Statute of Limitations, the plaintiff having been induced to defer bringing action by a representation by the defendant that he would not plead the statute.

In *Knights* v. *Whiffin*, Law Rep. 5 Q. B. 660 (1870), W., a merchant, sold 80 qrs. of barley to M., but did not separate them from the bulk of his grain in store. M. sold 60 qrs. to K. who paid for them and received from M. a delivery order, addressed to the station master of the railroad, who was posted at the town where the warehouse was situated. The station master took the order to W., who said, "All right, when you get the forwarding note I will put the barley on the line." Three sacks were weighed out, but the plaintiff, resting on W.'s assurance, gave no forwarding order until after M. had become bankrupt. W., then, as an unpaid vendor, refused to part with the grain. At the trial a verdict was directed for the defendant with leave to the plaintiff to move for judgment for the amount claimed. The court in banc gave judgment for the plaintiff; BLACKBURN, J., remarking: "No doubt the law is that until an appropriation from bulk is made so that the vendor has said what portion belongs to him and what to the buyer, the goods remain *in solido* and no property passes. But can Whiffin here be permitted to say 'I never set aside any quarters?' * * * In the present case the money was paid before the presentation of the delivery order, but I think, nevertheless, that the position of the plaintiff was altered through the defendant's conduct. The defendant knew that when he assented to the delivery order, the plaintiff, as a reasonable man, would rest satisfied. If the plaintiff had been met by a refusal on the part of the defendant he could have gone to Maris and have demanded back his money; very likely he might not have derived much benefit if he had done so, but he had a right to do it. The plaintiff did rest satisfied in the belief, as a reasonable man, that the property had been passed to him. * * * The plaintiff may well say 'I abstained from active measures in consequence of your statement and I am entitled to hold you precluded from denying what you stated was true.'"

These cases certainly seem literal enough in the enforcement of the doctrine of estoppel; on the other hand, in *Stimson* v. *Farnham*, Law Rep. 7 Q. B. 175 (1871), it was denied that the mere alteration of position involved in bringing an action was a sufficient ground for an estoppel, and in *East et ux.* v. *Doolittle*, 72 N. C. 562 (1874), it was said by RODMAN, J.: "The damage to support an estoppel against the owner of an estate and to convert him into a trustee must be something more substantial than would amount to a consideration in a contract. It must be a substantial one and of such a character that the person sustaining it cannot be adequately compensated by pecuniary damages."

II. *Will admissions to a third party estop?*

The current of authority is that an admission or declaration made to a third party cannot be made use of as estoppel.

In *Hearne* v. *Rogers*, 3 B. & C. 577 (1829), an alleged bankrupt had assisted his assignees in the sale of his goods, and after the issue of the commission against him, had given notice to the lessors of a farm held by him, that he had become bankrupt and would surrender the farm. The action being brought by him to test the validity of the commission. The above actions were held not to estop him from showing that he was not in reality a bankrupt, as they were admissions to a third party as between himself and the assignees.

In *Price* v. *Andrews*, 6 Cush. 4 (1856), an action against a deputy sheriff for seizing the property of the plaintiff under an execution against another, the plaintiff was held not estopped by declarations made to the agent of the execution plaintiff, who did not disclose his agency, that the property levied on was that of the execution debtor; METCALF, J., remarking: "Certainly no one can be estopped by a deceptive answer to a question, which he may rightly deem impertinent and propounded by a meddlesome intruder."

It has, however, been held that declarations to third parties coming to the ears of another who acts upon the information may estop. In *Mitchell* v. *Reed*, 9 Cal. 204 (1858), the plaintiff, a son of temperance, kept a grocery store, at which were sold liquors; the store was generally conducted by a clerk. On the trial it was proved that the plaintiff had repeatedly denied that he sold liquors, saying that those in the store belonged to the clerk; this coming to the ears of a creditor of the latter, he attached and sold the liquor as his. The plaintiff was held estopped from proving that the liquors were his. BURNETT, J., took very broad ground in his opinion. "If parties choose to make untrue statements by which others are injured, they should be estopped to unsay what they have before said. Estoppels in general are odious, but in mercantile and ordinary business transactions, where men must trust to appearances and the declarations of parties because they have no *other* means of information, in such cases the courts have been inclined to extend the list of estoppels." It may, perhaps, be questioned whether this case does not go a little too far, and whether to sustain it as a decision, there should not have been some evidence that the debt had been permitted to be contracted on the faith of the allegation that the liquor *belonged* to the clerk, the equivalent of which was implied in the decision of *Gailinghouse* v. *Whitwell*, 31 Barb. 208 (1868). This however does not affect it as an opinion on the point immediately under consideration.

III. *The effect of silence.*

Silence will often have the same effect as an action where it is the duty of the person to speak; as said by AGNEW, J., in *Chapman* v. *Chapman*, 9 P. F. Smith 214 (1868): "Silence will postpone a title when one should speak out, when knowing his own right one suffers his silence to lull to rest instead of warning of danger, when to use the language of the books, silence becomes a fraud. Such a silence, though negative in form, is operative in effect, and becomes suggestive in the seeming security it leads to." See also *Stephens* v. *Baird*, 9 Cow. 274 (1828).

IV. *Whether to sustain an estoppel by conduct, there must be an intention to deceive, or whether such action as might be supposed to mislead an ordinarily careful man will be sufficient even without any deceitful intent or its equivalent, gross negligence, on the part of the person sought to be estopped.*

This question has perhaps been the subject of greater difference amongst the authorities than any other arising out of the entire doctrine of estoppel by conduct. *Pickard* v. *Sears*, 6 Ad. & Ell. 469, is generally considered the leading case upon this branch of the

subject, though there are one or two American cases on the same question, which antedate it; yet on account of its frequent citation and because a certain phrase in Lord DENMAN'S opinion has led to considerable discussion, not to say confusion, we may well take it as a starting point.

The facts of *Pickard* v. *Sears* were briefly as follows: A fi. fa. was issued against one Metcalfe, and certain machinery in his possession, but on which the plaintiff held a mortgage with a covenant that he might enter upon the defendant's premises and take possession of the machinery, was levied on and sold to the defendants. No notice of the mortgage was given to the sheriff until after the sale. After the levy and before the sale the execution creditor's attorney had several conversations with the plaintiff, sometimes in Metcalfe's presence, with regard to the seizure, in the course of which the plaintiff never made any claim, though he stated that Metcalfe was his debtor, but consulted the attorney as to the best way of disposing of the machinery; after certain negotiations for a sale had failed, the attorney advised the plaintiff to raise a sum of money and pay off the judgment, and the plaintiff referred the attorney to a person from whom it was unsuccessfully attempted to obtain the money; before the sale the attorney told the plaintiff that the defendants were about to purchase. There was no doubt that the mortgage was a bonâ fide one and that the defendants purchased without notice of it. The plaintiff was held estopped. Lord DENMAN said: "But the rule of law is clear that where one by his words or conduct *wilfully* causes another to believe the existence of a certain state of things and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time."

The word "wilfully" has been the source of considerable trouble to some courts professing to follow the rule here laid down, some giving to the word the force of "voluntary," others making it almost equivalent to "with malice aforethought."

Starting from *Pickard* v. *Sears*, the cases may be divided into three classes:

1. Those which hold that any course of action or declaration calculated to lead, and which does lead to action on the part of the person relying thereon, is sufficient to estop without reference to intention.

2. Those which hold that the course of action must have been pursued, or the declaration made, with intention to influence the person acting thereon, although there need not be any intent to deceive.

3. Those which hold that there must be either an intent to deceive, or gross negligence from which fraud may be inferred.

We are of course aware that there are several cases which seem to be very close upon the line of division, and to be referable to one or the other rather upon the opinion of the court than the facts of the case; but still we think that the above division can be clearly recognised as running through the authorities.

1. Amongst the cases of the first class we find *Gregg* v. *Wells*, 10 Ad. & E. 90 (1839), in which Lord DENMAN said: "*Pickard* v. *Sears* was in my mind at the time of the trial and the principle may be stated even more broadly than it is there laid down. A party, who negligently or culpably stands by and allows another to contract on the faith and understanding of a fact, which he can contradict, cannot afterwards dispute that fact in the action against the person, whom he has himself assisted in deceiving."

Cornish v. *Abingdon*, 4 H. & N. 549 (1859). In this case one G. the fore-

man of C., a map engraver, desiring to publish some maps on his own account, agreed with A., who was a publisher, to supply him with maps, &c., and entered an order as from A. in C.'s book. Goods were supplied to A. from C.'s premises, accompanied in some instances by a delivery order as follows: "Mr. A. please receive, &c., from W. C." Receipts to the same effect were signed by A. C. made out an account charging A. and handed it to G., who showed it to A., who accepted bills for a portion of it and paid part in cash, which G. delivered to C. Other goods being supplied, C. sent A. an invoice thereof, charging him. A. applied to G., who said it was a mistake, but did not inform the plaintiff. The jury found that A. did not authorize G. to use his name, but that he had acted in such a way as to lead C. to believe that he was selling to him. Judgment was entered for the plaintiff, the court holding A. estopped. POLLOCK, C. B. said: "If any person by a course of conduct or by actual expressions so conducts himself that another may reasonably infer the existence of an agreement or license, whether the party intends that he should do so or not, it has the effect that the party using that language or who has so conducted himself cannot afterwards gainsay the reasonable inference to be drawn from his words or conduct." BRAMWELL, B.—"The rule is that if a man so conducts himself, whether intentionally or not, that a reasonable person would infer that a certain state of affairs exists and acts on that inference he shall be afterwards estopped from denying it."

Woodley v. *Coventry*, 2 H. & C. 164 (1863); in this case one Clarke applied to the plaintiff for an advance on some flour which he had purchased of the defendant, and gave the plaintiff an order on the defendant for the flour; before making the advance the plaintiff sent to the defendant's warehouse to ask if the flour "were all in order," and received as an answer, "Yes." The messenger took samples of the flour and the plaintiff made the advance. Clarke became a bankrupt and absconded without paying for the flour, which had not been specifically appropriated. The defendant claimed to hold as an unpaid vendor. There was a verdict for the plaintiff, and a rule for a new trial was discharged, the court holding the defendant estopped by his answer to the plaintiff's inquiry. See also *Knight* v. *Whiffin*, *supra*.

In the United States, one of the earliest cases of this class is *Buchanan* v. *Moore*, 13 S. & R. 304 (1825). Certain lands of Buchanan were levied on. At the sale, in the presence of Moore and others, Buchanan alleged that a certain piece of ground was included in the levy. Under that impression Moore bought, and afterwards brought ejectment for the said piece; on the trial the defence was that it had not in fact been included in the levy, and hence was not sold under it. In the Common Pleas the judge charged: "If the levy in its terms were such as might reasonably include it (the land in dispute), and it was represented at and before the sale to be included by General Buchanan, and on the faith of such representations John Moore became the purchaser, Buchanan, under such circumstances, would be bound by his representations and not otherwise. * * Although the levy was not intended to include the land in dispute, if, in its terms it might fairly be construed to include it, and both Moore and Buchanan believed it was included and it was so represented by Buchanan, before and at the sale, then by purchase the right to the whole vested in the purchaser and under his deed he was entitled to the possession." There was judgment for the plaintiff which was affirmed by the Supreme Court, GIBSON, J. saying "If by reason of the defendant's declarations at

the sale the plaintiff was induced to purchase under a belief that it was included, although the sheriff's deed would not convey the legal title, yet his purchase would give him an equity, which chancery would render effectual by decreeing a conveyance, and this whether such declaration proceeded from design or misapprehension of the fact. If both are equally innocent a loss in consequence of the acts or declarations of the one ought not to be borne by the other."

In *The Manufacturers' and Traders' Bank* v. *Hazard*, 30 N. Y. 226 (1864), it was said in the opinion of the court by T. A. JOHNSON, J., "It is not necessary to an equitable estoppel that the party should design to mislead. If his act was calculated to mislead and actually has misled another acting in good faith and exercising reasonable care and diligence under all the circumstances, that is enough."

See also *Chapman* v. *Chapman*, *supra*, where AGNEW, J., said: "Positive acts tending to mislead one ignorant of the truth and which do mislead him are a good ground of estoppel, and ignorance of title on the part of him who is estopped will not excuse his act;" and *Storrs* v. *Baker*, 6 Johns. Ch. 166 (1822); *Finnegan* v. *Carraher*, 47 N. Y. 493 (1872), and *Commonwealth* v. *Moltz*, 10 Barr 530.

2. Of the second class we have *Freeman et al.* v. *Cooke*, 2 Ex. 654 (1848). The plaintiffs were assignees in bankruptcy of W. Broadhead, the defendant was a deputy-sheriff. A *fi. fa.* had been issued against J. and B. Broadhead, and given to the defendant to serve; the bankrupt anticipating a distress for rent had removed his goods to the house of one of his brothers. When the officer came to levy, the bankrupt, imagining that he had a distress, said that the goods belonged to B. Broadhead, and after the production of the writ that they belonged to another brother, and finally that they were his own. The deputy seized the goods and the assignees brought an action. On this state of facts it was held that the plaintiffs were not estopped to prove property. PARKE, B., said (after quoting Lord DENMAN'S enunciation of the rule, *ut supra*): "By the term 'wilfully,' however, in that rule we must understand, if not that the party represents that to be true which he knows to be untrue, at least that he means his representation to be acted upon accordingly, and if, whatever a man's real intention may be, he so conducts himself that a reasonable man would take the representation to be true and believe that it was meant that he should act upon it and did act upon it as true, the party making the representation would be equally precluded from contesting its truth, and conduct by negligence or omission, whenever there is a duty cast upon a person by usage of trade or otherwise, to disclose the truth, may often have the same effect. * * * But * * * the finding of the jury is insufficient to entitle the defendant to have a verdict. * * * It is not found that he intended to induce the officer to seize the goods as those of Benjamin, and whatever intention he had on his first statement was done away with by an opposite statement before the seizure took place. Nor can it be said that any reasonable man would have seized the goods on the faith of the bankrupt's representation taken all together." This last sentence seems to give a double aspect to the case—still it will be observed that the opinion contains an express modification of Lord DENMAN'S doctrine. In *Jardon* v. *Money*, 5 H. L. 185 (1854) the opinion of the same eminent judge was considered by Lord CRANWORTH, who thought it stated the doctrine a little too broadly and agreed with Baron PARKE'S statement. In this case it was also decided that the rule of equitable estoppel was applicable to misrepresentation of fact only

and not of intention; from this decision, however, enforced by Lords CRANWORTH and BROUGHAM, Lord ST. LEONARDS dissented in a very strong opinion.

In *Welland Canal Co.* v. *Hathaway*, 8 Wend. 480 (1832), NELSON, J., thus stated the doctrine: "As a general rule a person will be concluded from denying his own acts or admissions, which were expressly designed to influence the conduct of another and did so influence it, and when such denial will operate to the injury of the latter."

In *Otis* v. *Sell*, 8 Barb. 102, PAIGE, P. J., said: "The act must have been expressly designed to influence the conduct of another and must in fact have influenced it." The necessity of intention was also held in *Wilcox* v. *Howell*, 44 N. Y. 398 (1871). In *Brown* v. *Bowen*, 30 Id. 541 (1861), that the party had reason to believe his declaration or action would influence the other was regarded as equivalent to actual intention so to influence.

The point was very learnedly considered in New Jersey in the case of *Kuhl* v. *Jersey City*, 8 C. E. Green 84 (1872). Kuhl bought property in Jersey City from one N., having procured a certificate from the collector of the amount of taxes due. On the delivery of the deed N. went to the collector, gave him his check for the amount and received receipts as follows: "Received payment. Jas. H. Love, collector." On the faith of the receipt Kuhl paid the purchase-money for the property. The check was not paid, and the collector advertised the property for sale for the arrears of taxes. The plaintiff then filed a bill to restrain the sale. There was nothing to show that Love knew the use to be made of his receipts. ZABRISKIE, Ch., in dismissing the bill said: "There is a seeming conflict among the numerous decisions on the doctrine of *estoppel in pais*, sometimes called equitable estoppel, whether any one will be estopped by a representation made which turns out not to be true, where there was no intention to influence the conduct of any one by it and where it was not apparent that the representation would have that effect. I take the doctrine established by the decided weight of authority, that there must be such intention or that it must be so apparent that the representation will have that effect that the intention must be presumed." See also *Dezell* v. *Odell*, 3 Hill 215 (1842); *Plummer* v. *Lord*, 9 Allen 455 (1864); *Turner* v. *Coffin*, 12 Id. 401 (1866).

3. Of the third class, *Andrews* v. *Lyons*, 11 Allen 349 (1865), is a good example. A note was given by the defendant to the firm of C. & W. in payment for liquors sold in violation of law; the note was offered for sale to the plaintiff, who first went to the defendant and inquired with reference to the note; the defendant said: "Yes it is all right, I shall pay it soon." The plaintiff then bought the note. AMES, J., charged that if the plaintiff, before purchasing the note, received from the defendant what could be reasonably and fairly understood as an assurance that it was a lawful and binding one, the defendant would be estopped from setting up the illegal consideration as against the plaintiff. This the Supreme Judicial Court reversed, holding that there must be shown intentional deception.

In *Boggs* v. *Merced Mining Co.*, 14 Cal. 368 (1858), Mr. Justice FIELD held the same doctrine announced by him in the principal case, and laid down as one of the conditions of estoppel that the party sought to be estopped must have "made the admission with the express intention to deceive or with such carelessness and culpable negligence as to amount to constructive fraud;" and in *Henshaw* v. *Bissell*, 18 Wall. 271 (1873), the same judge said: "There must be some intended

deception in the conduct or declaration of the party to be estopped, or such gross negligence on his part as to amount to constructive fraud." See also *Danforth* v. *Adams*, 29 Conn. 107 (1860). It has, however, been held that the intention to deceive may be a general one and have no especial reference to the particular person who seeks to enforce the estoppel.

In *Horn* v. *Cole*, 51 N. H. 287 (1868), the plaintiff packed certain goods, directed them to his son, C. E. Horn, and delivered them to a freight agent. Cole, a creditor of the son, attached the box and its contents, and the plaintiff brought trover. There was no evidence that when Horn carried the goods to the station, he told Cole the goods belonged to the son. There was no evidence that the plaintiff intended to deceive the defendant especially, but rather that his intention was to deceive his own creditors. He was held estopped, and PERLEY, C. J., said: "The evidence reported in this case was competent to prove * * * that Cole believed the representations to be true, and relying on them as true, caused the goods to be attached as the property of C. E. Horn, and also that the plaintiff made these representations, knowing them to be false, with the intention that all persons who were interested in the subject should take them to be true * * * to deceive his own creditors. * * * But we cannot infer that the plaintiff had Cole in his mind as an individual whom he meant to deceive. * * * This raises the point * * * whether to estop a party from showing that representations were false it is necessary that the false representations should have been intended to deceive and defraud the individual party who trusted to them and acted on them provided there was a general intention to deceive and defraud all persons who were interested in the subject-matter of the false representations. * * * We are content to follow where the spirit and general tone of those decisions lead, and they lead plainly to the conclusion that where a man makes a statement disclaiming his title to property in a manner and under circumstances such as he must understand, those who heard the statement would believe to be true, and if they had an interest in the subject would act on as true, and one, using his own means of knowlege with due diligence, acts on the statement as true, the party who makes the statement cannot show that his representation was false to the injury of the party who believed it to be true and acted on it as such; that he will be liable for the natural consequences of his representation, and cannot be heard to say that the party actually injured was the one he meant to deceive, or that his fraud did not take effect in the manner he intended."

V. *The effect of a record.*

It may be noticed further as a point arising in the principal case that a person will not be estopped, by his silence at least, where there is record evidence to which the other party might have resorted for information. This proceeds from the familiar principle that where there is equal knowledge or means of knowledge, there can be no estoppel, because in the view of the law no injury can be done to a man by telling him that which he knows, or, by the exercise of reasonable diligence, can readily know, to be untrue; as said by STRONG, J., in *Hill* v. *Eppley*, 7 Casey 331 (1858). "If, therefore, the truth be known to both parties or if they have equal means of knowledge there can be no estoppel."

In *Knauff* v. *Thompson*, 4 Harris 357 (1851), the point of the effect of a record was directly ruled as preventing an estoppel, the court, in its opinion, however, intimated that the effect of action might be different from that of mere silence, and that while the latter would not estop in the face of a deed on record the former might.

The same was held in *Crest* v. *Jack*, 3 Watts 240, by SERGEANT, J. "Nor was the plaintiff bound to notify Blair of his right in the land or of his dissent to the erection of the buildings. Blair was well acquainted with the titles * * * and if he was not he was bound to inquire. * * * It was matter of record accessible to all."

H. BUDD, JR.

Circuit Court of the United States—District of Kentucky.

W. H. COOKE *v.* C. C. FORD AND H. T. ARNOLD.

Section 639, of the Revised Statutes of the United States, relating to the removal of causes from state to federal courts, is not entirely repealed by the Act of March 3d 1875.

The third subdivision of section 639, relating to suits between citizens of the states in which they are brought, and citizens of other states, not being inconsistent with the Act of 1875, is not repealed by it.

The result of the provisions of the third subdivision of section 639, and the Act of 1875, taken together, is, First that no citizen of a state in which a suit is brought can remove it, except on petition filed before or at the term at which it might first be tried. Second, that where a suit is between citizens of different states, neither of whom is a citizen of the state in which the suit is brought, neither party can remove it except on petition filed before or at the term at which it might first be tried. Third, but when the suit is between a citizen of the state in which it is brought and a citizen of another state, the latter may remove it by petition filed, at any time before trial or final hearing upon making an affidavit of prejudice or local influence which will prevent his obtaining a fair trial.

The repeal of statutes by implication is not favored, and will not be held unless the two are incapable of being reconciled.

MOTION to remand the case to the state court.

The action was brought in the Warren Circuit Court of Kentucky, on the 7th of January 1874. It was subsequently transferred to the Warren Court of Common Pleas. The defendant, Ford, making no defence, judgment was rendered against him by default, according to the practice prevailing in the state. The defendant, Arnold, filed his answer, which tendered an issue of fact triable by jury. After the time at which the cause could have been first tried, and, in fact, after at least one mistrial, subsequent to the passage of the Act of Congress of 1875, Arnold filed his petition in said court for the removal of the suit into this court. At the time he filed this petition he made and filed in the state court, an affidavit stating that he had reason to believe, and did believe, that, from prejudice or local influence, he would not be able to obtain justice in the state court. The prayer of the petition was granted.

A copy of the record having been filed in this court, the plaintiff,

Cooke, entered his appearance, and moved that the cause be remanded to the state court.

BALLARD, J.—The sole ground of the motion is that the petition for removal was filed in the state court too late.

The counsel of plaintiff, with a frankness characteristic of those counsel only who perceive with clearness the true question involved in a case, concedes that the defendant's application for a removal is literally covered by the provisions of the third subdivision of section 639 of the Revised Statutes; and he stakes his case on the position that these provisions are repealed by the Act of March 3d 1875: Statutes at Large, vol. 18, p. 470.

The question thus presented for a decision is a narrow one, but it is by no means free from difficulty. Neither the researches of counsel nor my own examination has developed any case which decides or even throws much light on the question. The only authority to which I have been referred bearing on the precise question at issue, is the late pamphlet by Judge DILLON, on the "Removal of Causes from State to Federal Courts." The learned author, after indicating, doubtfully, his own opinion that the part of subdivision three which refers to the time of removal is not repealed by the Act of 1875, says: "This has been decided to be so in the Eighth Circuit by Mr. Justice MILLER, and generally in the courts of that circuit, and, so far as we are advised, by the Circuit Courts elsewhere."

I should be disposed to follow, without question, a single decision of so eminent a judge as Mr. Justice MILLER if such decision were supported by a written opinion, and I should certainly not hesitate to follow the settled rule of decision in the several circuits; but the bare statement that Judge MILLER has decided the question on the circuit, that his decision has been followed in his circuit, and, as far as known, in other circuits, though made by so accurate an author as the able judge of the Eighth Circuit, cannot dispense with the necessity of an independent examination of the question. Counsel have therefore discussed the question before me as an open one, and as such I propose to consider it. In prosecuting this examination I shall not refer to the acts of Congress relating to the removal of causes which were passed prior to the Revised Statutes. As the Revised Statutes repealed all such prior acts, reference to them would, I think, tend only to embarrass the inquiry. Indeed, the proposition discussed by counsel renders such reference superero-

gatory. The defendant's counsel rests his right to the removal on the ground that the third subdivision of section 639 of Revised Statutes is still in force; and the plaintiff's counsel rests his motion to remand on the ground that it is repealed.

Plaintiff's counsel does not, of course, insist that it is in terms repealed, but he maintains that its provisions are inconsistent with those of the Act of 1875, and hence that it is repealed by the express provision of that act, which declares that "all acts and parts of acts in conflict with the provisions of this act are hereby repealed."

I shall, for a like reason, confine my attention to the provisions of the statutes which relate to the removal "of controversies between citizens of different states," and shall omit all reference to the provisions contained in them which prescribe the amount necessary to give the court jurisdiction.

Omitting, then, all except what is necessary to elucidate the question before us, let us bring the provisions of the Revised Statutes and of the Act of 1875 together, and we shall then be the better able to see whether the latter are in conflict with the former.

Section 639 of the Revised Statutes provides that "any suit commenced in a state court * * * may be removed for trial into the Circuit Court. * * *

"First—When the suit is * * * by a citizen of the state wherein it is brought, and against a citizen of another state. * * *

"Second—When the suit is by a citizen of the state wherein it is brought against a citizen of the same and a citizen of another state.

"Third—When the suit is between a citizen of the state in which it is brought and a citizen of another state."

The Act of 1875 authorizes the removal of any suit of a civil nature * * * now pending, or hereafter brought in a state court in which there shall be a controversy between citizens of different states.

In the first case the suit may be removed on the petition of the defendant only, filed in the state court at the time of entering his appearance in said court.

In the second case the suit, as against the citizen of another state, may be removed on his petition filed at any time before trial or final hearing.

In the third case the suit may be removed by the citizen of the state other than that in which the suit is brought, whether he be plaintiff or defendant, on his petition filed at any time before trial

or final hearing of the suit, if before, or at the time he files his petition he makes and files in the state court an affidavit stating that he has reason to believe, and does believe, that from prejudice or local influence he will not be able to obtain a fair trial in the state court.

In the last case (Act of 1875) the suit may be removed by either party—whether he be plaintiff or defendant—a citizen of the state in which the suit is brought, or a citizen of another—on his petition filed in the state court, before or at the term at which the suit could be first tried and before the trial.

The first subdivision of section 639 is doubtless superseded by the more comprehensive provisions of the Act of 1875; and there is much ground for the position that the second subdivision is likewise superseded by a provision in the Act of 1875, which has not been here mentioned; but I cannot perceive that subdivision three is superseded by the latter act, or that the provisions of the two are in any respect inconsistent.

The Act of 1875 provides that, when the suit presents a controversy between citizens of different states it may be removed by either party on his petition, filed before or at the term at which the suit could be first tried and before the trial. Subdivision three provides that when the suit is between a citizen of the state in which it is brought and a citizen of another state, such citizen of the other state may remove it on petition filed at any time before the trial or final hearing, if before or at the time he files the petition, he makes his affidavit of "prejudice or local influence."

Taking the provisions together, it follows,

First—That no citizen of a state in which a suit is brought can remove it, except on petition filed before or at the term the suit might first be tried.

Second—That when the suit is between citizens of different states, neither of whom is a citizen of the state in which the suit is brought, neither party can remove it except on petition filed before or at the term the suit might be first tried.

Third—But when the suit is between a citizen of the state in which it is brought and a citizen of another state, the latter may remove it on petition filed at any time before the trial or final hearing, if before or at the time he files his petition, he makes an affidavit of "prejudice or local influence."

The first and second propositions are founded on the Act of 1875,

and the third on subdivision three, and thus reading the provisions of these statutes, they seem to me entirely consistent; nay, it appears that the failure of the Act of 1875 to repeal subdivision three was suggested by a sound policy.

In a suit between citizens of different states, when neither party is a citizen of the state in which the suit is brought, there is no ground for investing either party with more than his strict right of removal. There is no ground for supposing that "prejudice or local influence" will affect one party more than the other, and therefore no ground of extending the time of his application beyond an early stage in the cause. So when the suit is between a citizen of the state in which it is brought and a citizen of another state, there is no ground for supposing that "prejudice or local influence" will operate against the former, and therefore there is no ground for extending the term of his application; but when the suit is between a citizen of the state in which it is brought and a citizen of another state, there may be many instances where "prejudice or local influence" may prevent justice being done the latter. This prejudice or local influence may not exist in the first stages of the cause, or, if it existed, it may not then be discovered. It may be subsequently developed.

There seems, then, to be the most substantial reason for allowing such citizen of another state to remove a suit at any stage before trial or final hearing when it appears that, owing to such "prejudice or local influence," he cannot obtain justice in the state court.

Here I might rest the argument, but I think it possible to make the demonstration still more complete.

Subdivisions one and three of section 639, and the Act of 1875, all authorize the removal of a suit on the petition of the defendant when the suit is by a citizen of the state in which it is brought against the citizen of another state. Of course I know that subdivision three also authorizes the removal of such a suit on the petition of the plaintiff when he is not a citizen of the state in which the suit is brought, and that the Act of 1875, not only authorizes the removal of such suits, but of all suits between citizens of different states at the instance of either party. But, as I wish to compare the provisions which relate to the same character of suit, and to a removal demanded by the same party, I omit all reference to the provisions of subdivision three, and the Act of 1875, which relate to a removal on the application of the plaintiff; and I also omit all

reference to the provisions of the Act of 1875, which authorize a removal in any suit between citizens of different states, though neither party is a citizen of the state wherein the suit is brought. I omit them because their presence only obscures the inquiry, by diverting the attention from the true question, namely, the consistency or inconsistency between subdivisions one and three, and the Act of 1875, as they all relate to a suit of the same character; that is, to a suit by a citizen of the state in which it is brought against a citizen of another state, and to a removal demanded by the same party.

I repeat, then, that subdivisions one and three, and the Act of of 1875, all authorize the defendant to demand a removal in a suit by a citizen of the state in which the suit is brought against a citizen of another state.

By subdivision one he may have a removal on petition filed at the time he enters his appearance in the state court.

By the Act of 1875, he may have it on petition filed before or at the term the cause could be first tried, and before the trial.

By the third subdivision, he may have it on petition filed before the trial or final hearing of the suit, if, before or at the time of filing of said petition, he make and file an affidavit as to prejudice or local influence.

It is thus readily seen that the provision of the Act of 1875 is inconsistent with that of subdivision one. Each covers precisely the same ground, and, of course, both cannot stand. But it is just as readily seen that there is no inconsistency whatever between subdivision three and the Act of 1875. The one confines the application to a limited time; the other extends the time for a good and substantial reason. Indeed, it must be seen that there is as perfect consistency between subdivision three and the Act of 1875 as between subdivisions one and three.

I have not overlooked the opposing argument founded on the title and the general scope of the Act of 1875. It is entitled "An Act to determine the jurisdiction of the Circuit Courts of the United States, and to regulate the removal of causes from state courts, and for other purposes." To determine the jurisdiction of Circuit Courts seems to imply that this act only is to be referred to in order to determine what the jurisdiction of the Circuit Courts is. "To regulate the removal of causes from the state courts" seems to imply that in this act only are to be found the rules which govern the

removal of causes. But the title of an act is entitled to little or no consideration in determining the meaning of provisions found in the body, and can never work the repeal of a prior act by its own force. If the provisions of the last act are consistent with those of the first, such consistent provisions remain in force, however clearly the legislature may have indicated, in the title of the last act, an intention to repeal the former.

Nor is the argument founded on the scope of the act more forcible. Its scope is, indeed, broad. It greatly enlarges the civil jurisdiction of the Circuit Courts, but it does not embrace the whole. It limits the jurisdiction which it confers to suits "where the matter in dispute exceeds $500;" but there are several provisions of the Revised Statutes which extend the jurisdiction to suits involving less than this amount. See section 629, subdivisions 10, 11, 12, 16 and 17. Nor can it be contended that it embraces all prior acts which relate to the removal of suits. See sects. 640, 641, 643, Rev. Stats. Of course, as it does not embrace all prior acts which confer jurisdiction or authorize removal of suits, and does not, in terms, repeal them, it cannot, under any rule of interpretation, be held to repeal them by implication.

At one time, during the course of this investigation, I was strongly inclined to think that, although the Act of 1875 does not either in terms or by implication, repeal all prior acts which relate to the removal of civil causes from state courts to the Circuit Courts of the United States, it should be held to furnish the one rule for the removal of all such suits as it authorized to be removed, and thus to repeal all prior acts which prescribe a different rule; that as it authorizes and prescribes a rule for the removal of all suits in which there is a controversy between citizens of different states, it repeals by implication all prior acts which relate to the removal of similar suits, and that, as subdivision three does relate to the removal of a similar suit, that is, a suit between a citizen of the state wherein it is brought and a citizen of another state, which is certainly included in a suit between citizens of different states, it is repealed. But subsequent reflection has satisfied me that this argument is more specious than sound, and that its whole force is derived from its omission to notice the provision in subdivision three relating to "prejudice or local influence," which is nowhere found in the Act of 1875.

It is true, I suppose, that Congress cannot authorize the removal

of a suit to the Circuit Court, of which it cannot confer original jurisdiction on that court, and it is true that Congress cannot confer jurisdiction on the Circuit Court to try an ordinary suit between citizens of the same state on the ground of prejudice against one party or of local influence of the other; but it is also true that within the constitutional limits of the jurisdiction it may rest the right of removal upon such grounds as it deems best. It may authorize none to be removed, except on the ground of prejudice in the state tribunal against the party asking the removal, or the local influence of the opposite party, or it may authorize the removal of suits between citizens of different states where nothing more is shown than different citizenship at one stage of the proceedings, and the same suits to be removed at another stage, when prejudice, local influence or other matter is shown. Now, this is precisely what is accomplished by the joint operation of the Act of 1875 and subdivision three. The former requires the application for the removal of all suits, including a suit between a citizen of the state in which it is brought and a citizen of another state, when nothing more than different citizenship appears, to be made before or at the time at which the cause could be first tried. The latter allows the application for the removal of such a suit to be made at any time before trial or final hearing, when it also appears that the applicant is not a citizen of the state wherein the suit is brought, and that, owing to prejudice or local influence, he could not obtain justice in the state court.

But were the consistency between the Act of 1875 and of subdivision three less apparent, I should still be constrained, in view of the leaning of courts against implied repeals, to hold that the latter is still in force.

"To repeal a statute by implication, there must be such positive repugnancy between the provisions of the new law and the old, that they cannot stand together or be consistently reconciled:" *Wood* v. *United States*, 16 Pet. 342; *Cool* v. *Smith*, 1 Black 459; *United States* v. *Tynen*, 11 Wall. 92; *Hartford* v. *United States*, 8 Cranch 109; *Brown* v. *County Commissioners*, 21 Penna. 27; *Brown* v. *Dean*, 5 Hill 221; *Daruss, &c.*, v. *Fairbairn, &c.*, 3 How. 639; Potter's Dwarris on Statutes 154; Sedgwick on Statute and Constitutional Law 129.

In *Wood* v. *United States*, Mr. Justice STORY said: "There must be a positive repugnancy between the provisions of the new

laws and those of the old; and, even then, the old law is repealed by implication only *pro tanto* to the extent of the repugnancy."

In *Cool* v. *Smith*, Mr. Justice SWAYNE, quoting Mr. Sedgwick, said: "A repeal by implication is not favored." "The leaning of the courts is against the doctrine, if it be possible to reconcile the two acts of the legislature together."

Mr. Dwarris says: "Every affirmative statute is a repeal of a precedent affirmative statute when its matter necessarily implies a negative, but only so far as it is clearly and indisputably contradictory and contrary to the former act in the very matter (*Foster Case*), and the repugnancy such that the two acts cannot be reconciled."

A citation of these authorities was hardly necessary to support the argument in this case. The provisions of the Act of 1875, and those of subdivision three, have been shown to be perfectly consistent. The latter, therefore, must be held to remain unrepealed without invoking any technical rule of construction, or relying on the disfavor in which the courts hold implied repeals; but I have not thought such citation entirely out of place, since, if doubt remains in the mind of any one after reading the preceding abstract decision, it must be dispelled on considering the authorities.

Let an order be entered overruling the plaintiff's motion.

Supreme Court of Michigan.

AUSTIN B. WEBBER v. HOWE & HUBBELL.

Where A., a resident of Michigan, gives an order in that state to B., a citizen and resident of Ohio, for the purchase of liquors, and B. accepts it in Michigan, it is a contract made in Michigan, and void under the liquor law of that state.

Had B. been a mere agent, without authority to sell, but merely to take orders for transmission to Ohio for acceptance there, the contract might have been sustained as an Ohio contract.

The fact that the contract was not a completed sale until the liquor should be actually set apart from the vendor's stock, and that that act was to be done in Ohio, will not prevent it from falling within the prohibition of the Michigan law against all "*contracts* relating to liquors," &c.

Even though the order would have been void under the Statute of Frauds for want of writing, and therefore without effect until acted upon by the delivery of the goods to a carrier in Ohio, it is nevertheless a Michigan contract, for if the order was void there was nothing to bind the purchaser till his acceptance of the goods when delivered in Michigan.

A contract void when made because of a statutory prohibition may be validated

by subsequent legislation, but a repeal of the prohibitory statute, "saving all causes of action which have accrued," will not validate a contract made while the statute was in force.

ERROR to Wayne Circuit. This was an action upon an acceptance, to which the defence made was, that the consideration therefor was the sale of intoxicating liquors by plaintiffs, who were Ohio dealers, to defendant, a Michigan dealer.

Maybury and *Conely*, for plaintiff in error.

Griffin and *Dickerson*, for defendant in error.

The opinion of the court was delivered by

COOLEY, C. J.—The circuit judge charged the jury that if the order for the liquors, though taken in Michigan, was filled in Ohio, and the liquors were shipped in Ohio, and the defendant received them in Detroit and paid the freight, then the plaintiff would be entitled to recover. This instruction must assume that the contract was an Ohio contract; being completed by the acceptance and filling of the order in that state. Had the order been sent fromt his state to dealers in Ohio and filled there, or had an agent of the Ohio parties who had no authority to agree upon sales taken the order in this state and transmitted it to his principals who accepted and filled it, we think the instruction might have been sustained: *McIntyre* v. *Parks*, 3 Metc. 207; *Orcutt* v. *Nelson*, 1 Gray 536; *Garland* v. *Lane*, 46 N. H. 245; *Kling* v. *Fries*, 33 Mich. 275. But the order was taken here by one of the plaintiffs in person, and the acceptance, as well as the giving of it, took place in this state. There are some cases which have decided that, even under such circumstances, the sale is not completed until the property is actually separated from the stock in the store and delivered to the carrier in pursuance of the order: *Sortwell* v. *Hughes*, 1 Curt. C. C. 244; *Abberger* v. *Marvin*, 102 Mass. 70; *Dolan* v. *Green*, 70 Id. 322; but these cases are not important here, since whether the contract or sale was executory or actually completed by delivery it was equally invalid under our statute. The statute not only avoided all sales, but "all contracts or agreements relating thereto:" Comp. L. 2137.

It was suggested on the argument that, as the agreement was for the purchase of goods to the amount of more than fifty dollars, it was void under the Statute of Frauds for want of writing, and con-

sequently did not take effect as an agreement until acted upon by the delivery of the goods to a carrier in Ohio. But if we assume the original invalidity of the agreement in this state on this ground it cannot we think, help the vendor. If void originally it would not become binding upon the purchaser until he should do something in ratification of it, and it does not appear that anything further was done by him until the liquors were received in this state. His void order could not make any carrier to whom the vendor should see fit to deliver the goods his agent. The case must therefore stand either upon the original order, or upon the reception of the goods at Detroit under it; and in either case the contract must be regarded as a Michigan contract: *Hanson* v. *Armitage*, 5 B. & Ald. 557; *Acebar* v. *Levy*, 10 Bing. 376; *Morton* v. *Tibbit*, 15 Ad. & E. 428; *Bushel* v. *Wheeler*, 15 Q. B. 442; *Norman* v. *Phillips*, 14 M. & W. 277; *Farrina* v. *Home*, 16 Id. 119; *Outwater* v. *Doge*, 6 Wend. 400; *Lloyd* v. *Wright*, 25 Geo. 215; *Spencer* v. *Hale*, 30 Vt. 314; *O'Neill* v. *N. Y., C. & H. Railroad Co.*, 58 N. Y. 138; *Sheppard* v. *Pressey*, 32 N. H. 49; *Hart* v. *Bush*, E., Bl. & El. 494; *Curry* v. *Anderson*, 2 El. & El. 592; had this suit, therefore, been brought while the statute which forbade such contracts remained in force, there could be no question but the plaintiff must fail.

That statute, however, has been repealed, and the plaintiffs rely upon the repeal as taking away all impediment to a recovery. It was, it is said, in the nature of a penal statute. And when it was repealed, all penal consequences, including the inhibition to maintain suits for liquors sold fell with it: *Engle* v. *Shurts*, 1 Mich. 150; *Welch* v. *Wadsworth*, 30 Conn. 149; *Confiscation Cases*, 7 Wall. 454.

The prohibitory liquor law expressly made all contracts the consideration for which in whole or in part was the sale of liquors utterly null and void, except in certain specified cases of which this was not one. It also declared all moneys and securities received on such sales to be received without consideration, and authorized them it be recovered back: Comp. L. 1871, ch. 69. While this was in force the sale in question was made. The law was repealed in 1875, "saving all actions pending and all causes of action which have accrued" at the time the repealing act took effect: Public Laws 1875, pp. 279, 280.

It has often been decided that a contract invalid at the time it

was made for want of compliance with some statutory provision, or because of some statutory prohibition, might be validated by legislation afterwards: *Lews* v. *McElvain*, 16 Ohio 347; *Savings Bank* v. *Allen*, 28 Conn. 97; *Andrews* v. *Russell*, 7 Blackford 474; *Parmelee* v. *Lawrence*, 48 Ill. 331; *Dulancy's Lessee* v. *Tilghman*, 6 G. & J. 46; *Journeay* v. *Gibson*, 56 Penna. St. 57; *Carpenter* v. *Pennsylvania*, 17 How. 456; *Dentzell* v. *Waldie*, 30 Cal. 138; *Estate of Sticknoth*, 7 Nev. 223; *Gibson* v. *Hibbard*, 13 Mich. 215. But this case is not like those referred to. Here the statute has not undertaken to validate the void agreement, but has left it as it was, "utterly null and void." A suit cannot be brought upon it, because no contract ever existed. The repealing law, instead of indicating a purpose to validate such agreements, indicates the contrary purpose.

It only remains to consider a claim made by defendant to recover by way of set-off for moneys previously paid by him for liquors, and which, according to the law then in force, were paid without consideration. We have no doubt of his right to set-off these moneys if he proved the payment. This he claims to have shown by proving the payment by him of orders drawn by the plaintiffs in favor of third persons. We cannot see why this proof is not complete. Plaintiff relied upon *Buckley* v. *Saxe*, 10 Mich. 328. But that case was quite different. There, to prove that he had paid moneys on a bet, the plaintiff produced a note he had given for the sum bet; and this alone, it was held, did not prove the payment of money on the bet. Here the payment is proved, and as it was made on the drafts drawn by the plaintiffs on the defendant, it was in law a payment to the plaintiffs themselves.

The judgment must be reversed, with costs, and a new trial ordered.

Court of Appeals of Kentucky.

DAVIESS COUNTY COURT, APPELLANT, *v.* A. G. HOWARD ET. AL., APPELLEES.

A county, under legislative authority, having voted to subscribe $250,000 to the stock of a railroad company, and the legislation permitting bonds to be issued for the amount so subscribed, the county court issued bonds and sold them at a large discount, until enough were sold to pay the $250,000. *Held*, that the county board exceeded its powers in issuing bonds to a larger amount than the sum subscribed.

An authority to issue bonds to a specified amount, is not an authority to sell bonds to raise that amount.

The county court having thus exceeded its powers, cannot by any subsequent action affirm and validate its unauthorized proceedings. Express legislation would be necessary for that purpose.

On a bill filed by tax-payers to enjoin the levy of a tax to pay interest on the bonds issued in excess of $250,000, it appeared that the bonds were all sold to the railroad company in whose aid they were voted, and consequently with full knowledge on the part of its officers of all the facts. *Held*, that the relief prayed for should be granted, as the bonds in excess of the sum permitted were nullities in the hands of the company.

APPEAL from Daviess Circuit Court.

W. N. Sweeney and *James Wier & Son*, for the County Court.

George W. Jolly, for the taxpayers.

PRYOR, J.—This is an appeal in the name of the Daviess County Court against A. G. Howard and others, taxpayers of the county of Daviess.

The Owensboro and Russellville Railroad Company was chartered by an act of the legislature, passed in the year 1867. By the nineteenth section of the act of incorporation it was provided "that the county courts of Daviess, Ohio, Muhlenburg, and Logan counties shall have power, and are hereby authorized, to subscribe to the capital stock of the company in such number of shares as may be determined by said county courts respectively, and to levy upon the taxpayers of such counties respectively such taxes as may be necessary to pay the stock subscribed, and the said county courts may, if they shall deem it prudent, issue the bonds of said counties respectively for the amount of stock subscribed, or any part thereof, said bonds to be in such sums, and payable at such times, as said county courts may determine upon. That before such stock shall be subscribed by the county courts, the said county courts shall submit to the voters of said counties the proposition to subscribe stock and the amount thereof (to be suggested and fixed by the commissioners named herein), at an election to be held after due notice," &c.

The commissioners for Daviess county, in accordance with this provision of the charter, suggested to the county court a submission to the voters of the question, "Will the voters instruct the county court to subscribe 10,000 shares to the capital stock of the company?" The vote was regularly and properly taken, and a majority of the

voters favoring the subscription, the sum of $250,000 was subscribed and taken by the county as stock in the corporation, the shares being twenty-five dollars each.

At the July Term of the Daviess county court, held in the year 1868, it was ordered that George W. Triplett, the county judge, W. B. Tyler and E. C. Berry be and are hereby appointed a committee on behalf of the county court of Daviess county, "to have bonds executed and prepared of a sufficient amount to satisfy and pay off the subscription on the part of the county of Daviess to the Owensboro and Russellville Railroad Company. That said bonds be executed and made payable as follows, viz.: $50,000 five years from date, $50,000 ten years from date, $75,000 fifteen years from date, $75,000 twenty years from date, the bonds bearing interest at six per cent. per annum, payable semi-annually, for the payment of which coupons were attached," &c.

The committee, or a majority, were authorized by this order "to sell or dispose of the bonds, either to the Owensboro and Russellville Railroad Company, or to individuals, or to other corporations, on such terms as said committee may deem best and most advisable to the interests of the county of Daviess in paying the subscription," &c. At a subsequent term of the court, held in the same month, July 1863, it was recited "that as the court had ordered the committee to have bonds prepared and executed in a sufficient amount to satisfy and pay off the subscription, and to sell and dispose of said bonds either to individuals or corporations: It is now ordered, that said order be so amended as to authorize said committee to appoint agents to sell said bonds."

Under these orders of the county court the bonds of the county were executed, not only for the $250,000 and its interest, but for the additional sum of $67,350, making the whole amount of interest-bearing bonds, with coupons attached, $317,350.

These bonds, as is alleged in the petition, were sold to the railroad company in discharge of the county subscription, and many of them are now in the hands of parties unknown to the plaintiff in the action. A tax has been levied on the taxpayers of the county to pay the bonds as they matured, and the accruing interest on the whole amount.

The plaintiffs, the taxpayers of the county, instituted the present action in which they seek to enjoin the county court from collecting either the principal or interest upon the bonds issued in excess of

the $250,000, insisting that the county court, as the agent of the taxpayers, exceeded its authority in making sale of any of the bonds, and that the bonds other than those directed to be issued by the order of the county court made in July 1868, are void.

The county court or its committee acted upon the idea that it was invested with the power to execute and sell at a discount as many bonds as were necessary to raise the money to pay the subscription of $250,000. This is the sole question presented by the record. It is alleged in the petition that the railroad company, the Planters' Bank and others, are the holders of some of these bonds, and as they were made defendants to the action, and the court refused to pass upon the question as to the liability of the county to them, the appellees, the taxpayers have prayed a cross-appeal. This cross-appeal cannot be considered, as the parties against whom it is prayed, or who are to be affected by it, are not before the court. The court below has enjoined the county court from proceeding to collect the interest on the bonds in excess of the $250,000. These defendants, if they hold any such bonds, are not complaining, as they had failed to prosecute any appeal. The appeal is here by the Daviess county court against the taxpayer, that tribunal insisting upon its right to levy the tax to pay the interest on all the bonds issued and sold to satisfy the county subscription. The controversy is between the agent and the principal.

The county court by virtue of the nineteenth section of the act incorporating the railroad company, was invested with the power to pay the county subscription by levying a tax upon the property of the citizen, or by issuing county bonds in whole or in part discharge of the indebtedness.

The power to issue bonds was limited in amount to the sum subscribed by the county to the capital stock, and the county court, looking to the extent of the power with which it was clothed by the act in question, designated the number and amount of bonds to be issued by an order of that court made in July 1868. This order directed the execution of bonds for $50,000, payable in five years, a like amount payable in ten years, $75,000 payable in fifteen years, and a like sum payable in twenty years, with interest coupons attached, payable semi-annually. This covered the entire subscription, and when issued, it was proper for the county court to deliver them over to the railroad company in payment of the subscription made by the county. These were all interest-bearing bonds, and when exe-

cuted by the county for the amount of stock subscribed, the county court acted within the scope of the authority conferred by the act, and exhausted all the power that tribunal had to discharge the indebtedness in that manner. The act expressly authorized the county court to issue bonds for the amount of stock subscribed, but we find no power conferred by the charter upon the county court to issue bonds for $320,000. It was a cash subscription, and the interest-bearing bonds are to be regarded as equivalent to a cash payment, and, if the railroad company declined to accept them, in discharge of the subscription, it was the duty of the county court to raise the money by taxation.

That tribunal had no right either by reason of its jurisdiction over the subject-matter or by the letter or spirit of section 19 of the railroad charter, to issue bonds for an unlimited amount, and then place them upon the market at a discount in order to satisfy the debt to the railroad company. The power to issue the bonds does not imply the power to sell.

No general power is conferred upon county courts to issue such bonds or to subscribe stock in behalf of the county in which the tribunal exists to railroad companies or other corporations, and when this extraordinary power is conferred by legislative enactment by which a bare majority of the votes cast may impose upon a large minority of the citizens or taxpayers, a taxation by which they are to be burdened for years, courts should not be inclined to disregard, although it may be done by a liberal construction, the conditions and restrictions placed by the legislature upon such an exercise of power. The powers conferred by such legislation should be strictly pursued, and the fact that the county has incurred the liability cannot be held to justify any action the county court may see proper to take in order to secure its payment. In this case the voter agreed to be taxed in the sum of $250,000, the debt to be discharged by a direct tax, or by the issuing of bonds for that amount bearing interest. He has agreed to pay that sum, and to say that because he voted to pay that amount he is liable to pay the additional sum of $70,000 is not warranted by the letter or spirit of the law conferring the power on the county court to tax him or in consonance with natural justice.

If the legislature had been asked to vest in the county court of Daviess the power to raise by taxation the sum of $320,000, the whole sum bearing interest, to pay this debt of $250,000, would

such a proposition have received serious consideration; or if such authority had been expressly given, is it to be presumed that the taxpayer would have been so regardless of his own interest as to cast his vote in favor of the measure? It was never contemplated that these bonds should be sold at a discount, either by the county court or by the railroad company, so as to make the county responsible for the deficit. The power to sell the bonds to raise the money to pay for the stock was not given by the act. The bonds bearing interest were worth as much as the stock subscribed, and so regarded, no doubt, by the legislature when enacting the law. The county court, in fact, never authorized the issuing of bonds for a greater amount than $250,000, and if that tribunal had the right to exceed power conferred upon it, still it has not attempted to exercise this right except by a levy of the tax upon the citizen to pay the interest. It is maintained by the county court that, because it has once levied the tax, or continued to do so since the bonds were issued to pay the interest, this amounts to a ratification of the action of the county court by the taxpayers of the county. That the county court obtained all the power that could be properly exercised with reference to this question of taxation from the 19th section of the act incorporating the railroad company, is too plain for controversy. The county court, in issuing the bonds in excess of the $250,000, or permitting it to be done by the committee appointed by the court, transcended the authority given by the legislature, and no subsequent act of the county court, or of the taxpayer, can make valid the exercise of a power that had no legal sanction.

The corporation knew the extent of the power given the county court by the act incorporating the company. It received the bonds and is not complaining of the action of the court below. The action of the county court in collecting the tax upon the over-issue of of bonds, or the interest, was clearly illegal. They were nullities in the hands of the county court or the corporation, and the payment by the unwilling taxpayer cannot justify this unwarranted exercise of power. The voters of the county had no right to assume the burden except in the manner provided by the act. They could not ratify an act that neither the county court nor themselves had the power to perform. If the principal could not exercise the right it is difficult to perceive how his sanctioning its exercise by an agent could make it legal.

In making the over-issue the county court, or its committee, acted beyond the scope of its agency, and outside of the power given by the legislature. The only way in which the people could ratify it would be by a vote under a legislative enactment.

It is argued by counsel for the appellant (the county court) that there is no reason to discriminate between the holders of these bonds on account of the date of the purchase, and that there is no means of determining which of them are valid and which are not. This question cannot well arise between the county court and the tax-payer, and as there has been an excessive issue, the county court cannot complain of the injunction. It does not appear who has possession of the bonds. It is alleged that they were delivered or sold to the corporation, the railroad company. It was made a party defendant, and does not ask to have any equitable distribution of the fund, or to disclose even to whom it has transferred these bonds. The judgment below enjoining the county court from proceeding to collect the over-issue of bonds or the interest, by levying a tax upon the property of the appellees, is affirmed, and the cross-appeal of the appellees dismissed without prejudice.

RECENT ENGLISH DECISIONS (CONDENSED).

Court of Appeal in Chancery.

EAGLESFIELD *v.* MARQUIS OF LONDONDERRY.

The L. Railway Company was authorized by its acts of incorporation to issue 190,000*l.* preference shares and a large amount of ordinary shares. In 1864 it was amalgamated by Act of Parliament with the Cambrian Company, up to which time it had issued 85,000*l.* preference shares, which ranked as No. 1 preference stock, and 60 000*l.* ordinary shares, which ranked as No. 2 preference stock, and power was reserved to the Cambrian Company, to raise any capital which either of the amalgamated companies had power to raise prior to the amalgamation. The directors of the amalgamated company, under a bonâ fide belief that they were authorized to raise 15,000*l.* additional preference shares of the L. Company, and to make them rank with the 85,000*l.* No. 1 preference stock, issued 15,000*l.* shares of preference stock, and described them as No. 1 preference stock in the certificates, which were signed by the directors and the secretary, and which were handed to the plaintiff at the time he purchased some of the stock. It was subsequently decided that the new stock was not No. 1 preference stock, but ranked below it. *Held*, that the purchaser had not been deceived by any misrepresentation of fact, and his bill was dismissed.

THIS bill was filed in 1874, alleging that the plaintiff had been

[1] 4 Chan. Div. 693–718.

deceived by the form in which the stock had been issued and the certificates made, as set forth in the syllabus, and praying that the company, the directors, and the secretary, all of whom were made defendants, might be held responsible jointly and severally for the misrepresentation.

For the plaintiffs it was argued that the defendants were jointly and severally liable for the loss occasioned to the plaintiffs by the untrue representation contained in the certificate, that the stock purchased was preference stock. The bona fides of a false representation made no difference; citing *In re Bahia & San Francisco Railway Co.*, Law Rep. 3 Q. B. 584; *Burrowes* v. *Lock*, 10 Ves. 470; *Slim* v. *Crougher*, 1 D. F. & J. 518; *Reese River Silver Mining Co.* v. *Smith*, Law Rep. 4 H. L. 64; *Peek* v. *Gurney*, Id. 6 H. L. 377; *Ship* v. *Crosskill*, Id. 10 Eq. 73; *Swift* v. *Winterbotham*, Id. 8 Q. B. 244; *Pickard* v. *Sears*, 6 A. & E. 469; *Freeman* v. *Cooke*, 2 Ex. 654.

For the defendants it was argued that the misrepresentation was one of law, being occasioned by the erroneous construction put by the directors upon the Acts of Parliament authorizing the issue of stock; hence defendants were not accountable: *Beattie* v. *Lord Ebury*, Law Rep. 7 H. L. 102. But assuming that there was a misrepresentation of fact, there was no evidence that the plaintiffs acted upon the directors' misrepresentation; the directors would not be liable in an action of deceit: *Swift* v. *Jewsbury*, Law Rep. 9 Q. B. 301; *Rashdall* v. *Ford*, Id. 2 Eq. 750.

The Master of the Rolls, Sir G. JESSEL, made a decree for the complainant, from which this appeal was taken. On appeal the following cases were cited in addition: *Hart* v. *Frontino Gold Mining Co.*, Law Rep. 5 Ex. 111; *Henderson* v. *Lacon*, Id. 5 Eq. 249; *Scott* v. *Dixon*, 29 L. J. (Ex.) 62 n.; *Barry* v. *Croskey*, 2 J. & H. 1; *Mackey* v. *Commercial Bank of New Brunswick*, Law Rep. 5 P. C. 394; *New Brunswick Railway Co.* v. *Conybarre*, 9 H. L. C. 711; *Haycraft* v. *Creasy*, 2 East 92; *Ormrod* v. *Huth*, 14 M. & W. 651; *Stephens* v. *DeMedina*, 4 Q. B. 422; *Western Bank of Scotland* v. *Addie*, Law Rep. 1 H. L. Sc. 145; *Barwick* v. *English Joint Stock Bank*, Law Rep. 2 Ex. 259.

JAMES, L. J., said that the appeal must be allowed, since the plaintiff had not shown that he relied upon the misrepresentation. The whole misrepresentation consisted of this, that the vendor of

the stock sold it to the plaintiff, and a transfer was then sent to the company of "10,000*l.* of 5 per cent. preference stock No. 1," and across the certificate was written by the secretary, by authority of the directors, "coupons for 10,000*l.* preference stock, forwarded to the companies by (the vendor) are held by me to meet this transfer." The representation was meant to apply to the stock of 15,000*l.* issued to the Cambrian Company. The misrepresentation to sustain the bill must be wilful and fraudulent; this was not the case here, nor had the plaintiff shown that he had relied upon and been deceived by the misrepresentation. The certificate did not say that the stock transferred was part of the 85,000*l.* stock, nor did the plaintiff allege that he so believed, he merely alleged that he believed that he was getting genuine No. 1 stock; but he might have believed that the stock was part of the 15,000*l.* issued, and yet that it was genuine No. 1 preference stock, that is, that it ranked equal to the 85,000*l.* issued. Then he had delayed filing his bill from 1869, when he was informed of the probability that his stock was not genuine No. 1 stock, till 1874; that alone would be decisive against him.

BAGGALLAY, J. A., and BRAMWELL, J. A., concurred.

Appeal allowed and bill dismissed with costs.

Court of Appeal in Chancery.

MASTER *v.* HANSARD.[1]

Where a personal covenant is made by a tenant not to build without the landlord's approval, a subsequent lessee of the same landlord of an adjoining plot cannot compel the landlord to enforce for his benefit the covenant with the first tenant.

THE owner of two adjoining plots of land leased one for a term to A., and subsequently the other for a term to B. A. and B. at the time of their respective leases, covenanted respectively that they would not during the term do on the demised premises anything which would be an annoyance to the lessor and his tenants, or build on the ground demised, without first submitting the plans to the lessor, and obtaining his approval. Within twenty years A., with the approval of the lessor, began to build upon his ground, so as to darken B.'s windows. B. filed a bill to restrain A. from erecting, and the lessor from approving the building objected to.

[1] 4 Chan. Div. 718–724.

BACON, V. C., held that the plaintiff could not claim to have the restrictive covenant made by A. with the common landlord enforced by the latter, in her, B's., favor, but directed an inquiry as to damages, whereupon A. appealed. For B. it was argued, that if the common landlord had remained the owner and in possession of the property leased to A., he could not have built so as to darken B.'s, the plaintiff's, windows, for that would have been in derogation of his grant. If the grantor had such an interest in the adjoining property that he could have protected the easements which could have been enjoyed, if the adjoining property belonged absolutely to him, he was bound to protect them. [BRAMWELL, J. A.—Suppose the grant to A. had been in fee, would the covenant have run with the land?] It would. *Swansborough* v. *Coventry*, 9 Bing. 305; *Booth* v. *Alcock*, Law Rep. 8 Ch. 663; *Eastwood* v. *Lever*, 4 D. J. & S. 114; *Western* v. *MacDermott*, Law Rep. 2 Ch. 72; *Keates* v. *Lyon*, Law Rep. 4 Ch. 218; *Child* v. *Douglas*, Kay 560, were referred to.

BRAMWELL, J. A., was of the opinion that the appeal must be allowed. The doctrine as to the disposition by the owner of two tenements, did not apply. The grantor at the time of the grant to the plaintiff was not the owner of the land on which A. had built, in the sense of being able to make a grant of an easement over it, and there was therefore no reason why the law should imply a grant of it. Suppose the first grantees had covenanted to erect no buildings, and then trespassers had come in and built; could the plaintiff have called on the landlord to turn them out? So if the lessees had erected buildings, the plaintiff, in the absence of any covenant by her landlord to that effect, could not have called upon the landlord to enforce against the lessees their covenant not to build.

It would have been monstrous to hold that the covenant, the existence of which was not even communicated to the plaintiff, when her lease was taken, could be construed as enuring to her benefit.

JAMES, L. J., and BAGGALLAY, J. A., concurred.

Bill dismissed.

Court of Appeal in Chancery.

IN RE NEWMAN. EX PARTE CAPPER.[1]

Where articles contain covenants for the performance of several things, and one large sum is stated at the end to be paid upon breach of performance, that sum must be considered as a penalty. But where it is agreed that, if a party do a particular thing, such a sum shall be paid by him, there the sum stated may be treated as liquidated damages.

A CONTRACT for the erection of buildings to be used as a school, provided that they should be completed by a certain date, and that in default thereof the contractors should forfeit to the employer 10*l.* per week for every week after that date, for which the building should remain unfinished; and, also, that if the contractors were prevented by bankruptcy or any other cause from completing, the employer might rescind, and that the money already paid should be considered the full value of the works executed. There were various other stipulations, and a final provision that in case the contract should not be in all things duly performed by the contractors, they should pay to the employer 1000*l.* as and for liquidated damages. The buildings were not completed until long after the time fixed in the contract, on account of the contractors having become insolvent prior to that date. Subsequently the employer tendered a proof against the contractors' estate, for the 1000*l.* as liquidated damages for the breach of the agreement. No particular damage was alleged.

BACON, C. J., held that the 1000*l.* had been inserted as liquidated damages, and allowed proof of that sum against the contractors' estate in bankruptcy. On appeal for the employer, the appellee, it was argued that this was not the case of a large sum being specified as damages for the small one, in which case the court might construe the sum as a penalty, notwithstanding it was spoken of as liquidated damages. The court could not in this case estimate the damage caused by the non-opening and completing of the schools at the time fixed otherwise than by taking the estimate of the parties. *Atkyns* v. *Kinnier*, 4 Ex. 776; *Galsworthy* v. *Strutt*, 1 Id. 659; *Magee* v. *Lavell*, Law Rep. 9 C. P. 107; *Reilly* v. *Jones*, 1 Bing. 302; *Betts* v. *Burch*, 4 H. & M. 506; *Green* v. *Price*, 13 M. & W. 695, and *Kemble* v. *Farren*, 6 Bing. 141, were referred to.

[1] 4 Chan. Div. 724–734.

JAMES, L. J., said that the *ratio decidendi* of *Kemble* v. *Farren*, *supra*, was that wherever there was a sum mentioned in the end of a contract as damages for the non-performance of any of a great number of stipulations, there it must be treated as a penalty. The law was satisfactorily stated by HEATH, J., in *Astley* v. *Weldon*, 2 B. & P. 346, 353, as follows: "Where articles contain covenants for the performance of several things, and then one large sum is stated at the end to be paid upon breach of performance, that must be considered as a penalty. But where it is agreed that if a party do such a particular thing, such a sum shall be paid by him, there the sum stated may be treated as liquidated damages."

BAGGALLAY, J. A., concurred, referring to the language of Lord WESTBURY in *Thompson* v. *Hudson*, Law Rep. 4 H. L. 1, 30.

BRAMWELL, J. A., concurred.

Appeal allowed and order reversed

Vice Chancellor's Court.

ECCLESIASTICAL COMMISSIONERS FOR ENGLAND *v.* NORTH EASTERN RAILWAY COMPANY.[1]

Equity follows the law in refusing relief, where time has elapsed which at law would have barred the claim. But where the statute is sought to be used against good conscience and the plaintiff has not been guilty of laches, equity will remove the legal bar arising from lapse of time.

Where therefore a legal fraud has been committed (in this case a trespass upon the plaintiff's coal mines by an adjoining owner, more than six years before the bill was filed), but which was not discovered or discoverable by the plaintiff until a reasonable time (some two years) before the bill was filed, the Statute of Limitations is not a good defence.

The working of mines by the defendant's predecessor in title, a railway company, was admittedly *ultra vires*, and possibly this would have been a defence to the defendant, a company with which the first was subsequently amalgamated, for trespasses committed by the first company, in mining coal, by trespassing upon the plaintiff's adjoining mines. An Act of Parliament was passed, when the wrongful acts were in course of commission, by which the trespassing company was authorized to sell their mines within five years. Held, that the act of mining, though originally unlawful, was impliedly recognised and ratified by the permission in the Act of Parliament to sell the mines, and that the defendant was therefore liable for its predecessor's trespasses committed in the course of an act (mining) originally *ultra vires*.

---

[1] 4 Chan. Div. 845–868.

Wrongful acts (in this case of trespass) are not condoned by a subsequent general release, where the party injured has no ground for suspecting the particular wrongful acts complained of, and the release was by him intended to operate upon a different subject-matter.

BILL filed in 1872, for an account of coals taken in 1863, from a colliery of the plaintiff's by the West Hartlepool Railway Company, the adjoining owner, which in 1865 was amalgamated with the defendant company and its property transferred to the latter company, subject to all existing contracts, debts, engagements and obligations affecting the same, &c. In 1862, the boundaries of the two mines were settled by mutual agreement, and after some lengthy negotiations, a release was executed in 1864, by which all previous wrongful acts were condoned and released on both sides. An Act of Parliament was passed in 1863, by which the West Hartlepool Railway Company were required to sell their mines within five years. The trespass was not discovered nor, as the Vice Chancellor found from the evidence, discoverable till 1870.

The defence was (1) *ultra vires*, the West Hartlepool Company having no power by its charter to work coal mines. If it had been intended by the act of 1863 to allow the company to work the mines, power would have been expressly given them to do so: *Green* v. *London General Omnibus Company*, 7 C. B. N. S. 290; *Maund* v. *Canal Co.*, 4 Man. & G. 452; *Houldsworth* v. *Evans*, Law Rep. 3 H. L. 263; *Asbury Co.* v. *Riche*, Id. 7 H. L. 653; (2) the release of all prior claims, whether by trespass or otherwise; (3) the Statute of Limitations: *In re Kensington Station Act*, L. R. 20 Eq. 197; *In re Stead's Mortgaged Estates*, 2 Ch. D. 713; *Hovenden* v. *Lord Annesley*, 2 Sch. & Lef. 607, 613. The trespass here was committed more than six years before filing the bill. *Brooksbank* v. *Smith*, 2 Y. & C. Ex. 58, was distinguishable. *Denys* v. *Shuckburg*, 4 Y. & C. Ex. 42, decided that if a man had means of discovering the alleged fraud at an earlier period, and did not do so, then it was laches and he could not recover. The beginning of the plaintiff's knowledge was in 1862, when the first meeting was held to examine the boundaries; in any event the account would be limited to six years: *Dean* v. *Thwaite*, 21 Beav. 621; *Lockey* v. *Lockey*, Prec. Ch. 518; *South Sea Co.* v. *Wymondsell*, 3 P. Wms. 143; *Harcourt* v. *White*, 28 Beav. 303; *Trustees* v. *Gibbs*, Law Rep. 1 H. L. 93, 126; *Lindsay Petroleum Co.* v. *Hurd*, Law Rep. 5 C. P. 221; Bainbride on Mines, 3d ed., p. 611.